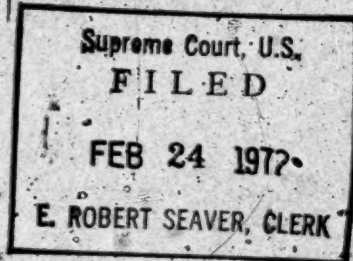


APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506



UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

—v.—

MIDWEST VIDEO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED OCTOBER 8, 1971.
CERTIORARI GRANTED JANUARY 10, 1972.

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

—v.—

MIDWEST VIDEO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

	Page
Relevant Docket Entries	1
Notice of Proposed Rulemaking and Notice of Inquiry In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals (Adopted December 12, 1968)	3
First Report and Order (Adopted October 24, 1969)	Pet. App. 31
Memorandum Opinion and Order (Adopted June 24, 1970)	Pet. App. 57
Memorandum Opinion and Order (Adopted January 21, 1971)	Pet. App. 65
Opinion of the Court of Appeals (May 13, 1971)	Pet. App. 15
Judgment of the Court of Appeals (May 13, 1971)	Pet. App. 30
Order Allowing Certiorari (January 10, 1972)	51

1

RELEVANT DOCKET ENTRIES
IN THE COURT OF APPEALS

Date

1970

- July 28 Docketing case. Petition for review of Order of Federal Communications Commission, and attachments
- Aug. 19 Stipulation of parties that neither record nor certified list will be filed.
- Oct. 30 Appendix
Brief of petitioner
- Dec. 17 Brief of Respondent, U.S.A.
- Dec. 28 Brief of Respondent F.C.C.

1971

- Jan. 22 Argued and submitted . . .
- Feb. 4 Motion of petitioner for stay of certain Rules of FPC (*sic*), etc.
- Feb. 10 Motion of American Civil Liberties Union to file brief as *amicus curiae*.
- Feb. 22 Order: Midwest Video Corp. granted stay and Comm. enjoined from enforcing § 74.111(a) against petitioner pending final decision, etc. Issuance of injunction conditioned on filing of bond (\$5000) with Clerk of this Court, etc. Court reserves jurisdiction to terminate injunction.
- Mar. 2 Order: Mtn of American Civil Liberties Union for lve to file brief *amicus curiae* denied for reason application untimely made and good cause not shown.
- May 13 Opinion by J. Van O, concurring opinion by J. Gibson.

1971

May 13 Judgment: Order of FCC requiring CATV operators to originate programs as condition for continued CATV operations set aside.

June 8 Cert. copy of Judgment.

Aug. 6 Notice of extension of time to Oct. 9, 1971 to file petition for certiorari

Oct. 18 Notice of filing pet. for Cert. in Sup. Court, U.S.

1972

Jan. 28 Order of Sup. Ct. granting Cert.

Jan. 28 Cert. trans. prepared for Sup. Ct.

FCC 68-1176

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 74, SUBPART K, OF THE
COMMISSION'S RULES AND REGULATIONS REL-
ATIVE TO COMMUNITY ANTENNA TELEVISION
SYSTEMS; AND INQUIRY INTO THE DEVELOP-
MENT OF COMMUNICATIONS TECHNOLOGY AND
SERVICES TO FORMULATE REGULATORY POL-
ICY AND RULEMAKING AND/OR LEGISLATIVE
PROPOSALS

Docket No. 18397

NOTICE OF PROPOSED RULEMAKING AND NOTICE OF INQUIRY
(Adopted December 12, 1968)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING
A STATEMENT; COMMISSIONERS COX AND ROBERT E. LEE CONCURRING
IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT; COM-
MISSIONER JOHNSON CONCURRING IN THE RESULT.

1. Notice is hereby given of proposed rulemaking and inquiry in the
above-entitled matter.

1. Nature and Scope of This Proceeding

2. The purpose of this proceeding is to explore the broad question
of how best to obtain, consistent with the public interest standard of
the Communications Act, the full benefits of developing communica-
tions technology for the public, with particular immediate reference
to CATV technology and potential services, and the nature of any
regulations and/or proposed legislation that may be necessary or de-
sirable to further this goal. Many of the matters discussed below (see
pts. II and V) have wide ramifications and pertain to other industries
in addition to CATV. While this exploration is sparked by CATV
development, our consideration of these matters necessarily entails a
much broader perspective. We believe that a far-ranging, overall view
is necessary if the Commission is to come to grips with this dynamic
field and succeed in its efforts to assure the public of the most efficient
and effective nationwide communications service possible.

3. The Commission is hopeful that this proceeding will provide
meaningful and practical assistance to its consideration of regulatory
problems which may require resolution within the next decade or so.
We plan to utilize the proceeding to obtain informed opinion, technical
information, and present viewpoints of interested persons, for the
inauguration of discussion of new questions as they arise, as a vehicle

for rulemaking action at appropriate stages, and as a basis for formulation of legislative proposals. Therefore, further notice, expanding or altering the scope of this *Rulemaking and Inquiry*, may subsequently be issued as necessary or appropriate. Any of the matters encompassed in this proceeding may be the subject of rulemaking actions within the Commission's present statutory authority or within any authority subsequently conferred by the Congress. Moreover, certain of the topics we intend to explore, particularly those requiring consideration of extensive economic or technical analysis, may be contracted out for special studies.¹ At the same time, some of the areas delineated below are of particular and immediate concern, and may require prompt regulatory action within the Commission's present authority. Accordingly, it is contemplated that rules may be adopted in some areas specified below, without issuance of a further notice.

II. Background

4. The Commission has long recognized that CATV is rapidly evolving from its original role as a small, five-channel, reception service bringing television broadcast signals to areas which lack broadcast service or do not receive the full services of the three national networks. In the *First* and *Second CATV Reports*,² we discussed at some length the trend of CATV, at that time, toward 12 channel systems and its proposed entry into large metropolitan centers. It now appears that cable technology may be on the verge of expanding system capacity to 20 or more channels, and that a variety of new services to the public are envisioned.

5. Thus, we note that the CATV industry generally is placing increased emphasis on program origination, both of a local public service nature and of the entertainment type,³ and on the provision of other services to the public. The Commission recently authorized a test of unrestricted program origination without commercials by CATV systems in the San Diego area, and conditioned the carriage of broadcast signals by one system upon a requirement that it operate to a significant extent as an outlet for noncommercial community self-expression. *Midwest Television, Inc.*, 13 FCC 478, 503-508, 510. In so doing, the Commission stated (13 FCC 2d at 505-506):

CATV program origination offers promise as a means for increasing the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service, without use of spectrum. Whereas television broadcast stations are usually located in or near a central community and are intended to serve a much broader area encompassing other communities, almost every community of any appreciable size could have its own CATV system and therefore its own local outlet. The CATV system is not handicapped by limited channel capacity, having 12 channels in comparison to the one channel of the individual broadcaster, and

¹ Moreover, it may be necessary for the Commission to expand its own research effort, in order not only to keep abreast of technology, but also to conduct studies (technical, economic, and social) of a type which would not normally be conducted by private industry or other government agencies. Such studies would be in keeping with the responsibilities assigned to the Commission by the Communications Act, and are essential if the Commission is to be responsive to public needs and requirements in the field of communication.

² *First Report and Order in Dockets Nos. 14895 and 18435*, 38 FCC 683 (1965); *Second Report and Order in Dockets Nos. 14895, 15233, and 15914*, 2 FCC 2d 725 (1966).

³ See, e.g., *Television Digest*, Mar. 11, 1968, p. 5; *New York Times*, Oct. 18, 1968, p. 87N.

thus has the technical flexibility to provide different types of programs or services on some channels without affecting the service simultaneously provided on other channels. Moreover, since the CATV operation is based on subscriber fees for the total package, the CATV operator is largely free of the broadcaster's economic requirement that the programming on each channel be such as to attract sufficient audience and advertising revenue to make operations on that channel viable per se. The CATV operator has more flexibility to present programming of minority interest on some channels. And, finally, CATV program origination does not entail the question of "unfair competition" posed by CATV importation of broadcast signals from another market (*Second Report*, 2 FCC 2d at 778-781), or any disparate situation with respect to copyright liability, and would be less likely to duplicate the programs of local broadcast stations. [Footnote omitted.]

The Commission also has pending before it a rulemaking proceeding to determine whether frequencies in the community antenna relay service should be used for the transmission of CATV originated program material (*Notice of Proposed Rulemaking* in docket No. 17999, 33 F.R. 3188).⁴ The matter of cable subscription television is included among the issues in docket No. 11279 (*Further Notice of Proposed Rulemaking and Notice of Inquiry* in docket No. 11279, 31 F.R. 5136).

6. There are other indications of impending CATV operations on a broader scale and in new areas of potential use. In New York City the Mayor's Advisory Task Force on CATV and Telecommunications has recommended, in a report dated September 14, 1968, that cable television service be made available to every home in that city within the next 2 or 3 years. It is contemplated that these CATV systems would initially have a minimum of 18 channels, of which 11 would be used to carry local television broadcast signals; three would be reserved for the exclusive use of the city (without charge to the latter), and four would be used for program origination. Each authorized cable television company would be permitted to use two of the program origination channels, one for the presentation of public service programs and the other for whatever programming it wished to offer, and would operate the other two channels as a common carrier making them available by lease to outside users who wish to present original programs.

7. The report to the mayor of New York City also contemplates that new uses for cable television channels will develop as channel capacity is enlarged over the coming years. In a letter accompanying the report, the task force chairman states:

In conclusion, the promise of cable television remains a glittering one. While progress toward realizing this promise has been slow, there is now an abundance of venture capital ready and able to extend cable television throughout the city. For venture capital sees the possibility of rich rewards. Those who own these electronic circuits will one day be the ones who will bring to the public much of its entertainment, news, and information, and will supply the communications links for much of the city's banking, merchandising, and other commercial activities. With a proper master plan these conduits can at the same time be made to serve the city's social, cultural, and educational needs. A master plan can be effective now. It will not be a decade hence if stop-gap expedients prevail.

8. It has been suggested that the expanding multichannel capacity of cable systems could be utilized to provide a variety of new com-

⁴ The Commission's rules governing the common carrier services do not prohibit such service to CATV systems.

munications services to homes and businesses within a community, in addition to services now commonly offered such as time, weather, news; stock exchange ticker, etc. While we shall not attempt an all-inclusive listing, some of the predicted services include: facsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airlines reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State, and municipal level; e.g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution, and traffic; various educational and training programs; e.g., job and literacy training, preschool programs in the nature of "Project Headstart," and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for political candidates, advertisers, amateur expression (e.g., community or university drama groups) and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community.

9. It has been suggested further that there might be interconnection of local cable systems and the terminal facilities of high capacity terrestrial and/or satellite intercity systems, to provide numerous communications services to the home, business, and educational or other center on a regional or national basis. The advent of CATV program origination in such cities as New York and Los Angeles (where there is also CATV activity) gives rise to the possibility of a CATV origination network or networks. The so-called "wired city" concept embraces the possibility that television broadcasting might eventually be converted, in whole or in part, to cable transmission (coupled with the use of microwave or other intercity relay facilities), thereby freeing some broadcast spectrum for other uses and making it technically feasible to have a greater number of national and regional television networks and local outlets. More broadly in the area of general communications, the present and future development of intercity facilities with very high communications capacity—e.g., the L5 coaxial cable, millimeter wave guides, communications by laser beams—coupled with the potential of the computer and communications satellite technologies,⁵ may stimulate the provision of new nationwide or regional services of various kinds, which would require connection to high capacity communications facilities within the locality and from the street to the premises of the consumer. Another matter to be explored

⁵ E.g., an increasing link between bulk data transmission and computers, and the special attributes of the satellite technology in the provision of service from one transmission point to many reception points, and in greater system flexibility as compared to fixed terrestrial facilities. As the satellite technology becomes more sophisticated, it might be utilized for multiple access data services and computer links, specialized switched networks, and random networks utilizing some mobile ground equipment for occasional service requirements.

in this area is the expanding multichannel capacity of CATV (together with its proposed auxiliary use of high capacity, local microwave links),⁶ including the question of whether it is technically and economically feasible for CATV to develop capability for two-way and switched services.

10. We shall first set forth the Commission's rulemaking proposals in the area of CATV program origination and related matters.

III. Proposed Rules Concerning CATV Program Origination and Related Matters; Technical Standards; and Reporting Requirements

Program origination

11. The increasing focus of the CATV industry on program origination raises questions which are imminent and require prompt rulemaking decisions by the Commission. We believe that the proposed rules discussed below are within the Commission's present statutory authority. However, here again, as we have previously stressed,⁷ the Commission is clearly concerned with new and important questions of policy and law in the communications field, and would welcome congressional guidance as to policy and legislation conferring direct general authority over CATV.

12. Preliminarily, we point out that we discuss below the possibility of the CATV operator leasing some channels on the system to others for the purpose of program origination or other communications services (see par. 26). The Commission is concerned about a common carrier acting as a program originator, and intends to return to this issue as the industry develops. Meanwhile, we believe that experimentation is most likely to come from CATV operators and that they should be encouraged both to originate themselves and to operate as common carriers on available channels to test the possible market.

13. It is the Commission's tentative conclusion that, for now and in general, CATV program origination is in the public interest. The Commission has also noted that there may be a need for some regulation thereof, in order to insure operation fully consistent with the public interest in the larger and more effective use of radio. (Sec. 303(g) of the Communications Act, as amended.) In *Midwest Television, Inc., et al.*, 13 FCC 2d 478, 505-506, the Commission recognized the promise of CATV program origination as a means for increasing the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service, without use of broadcast spectrum (see quote in par. 5 above). We pointed out that almost every community of any appreciable size could have its own local CATV outlet, and that the CATV operator has greater technical and economic flexibility than the broadcaster to present programming of minority interest on some channels. We further noted that "CATV program origination does not entail the question of 'unfair competition' posed by CATV importation of broadcast signals

⁶ E.g., *Teleprompter Corp.*, 12 FCC 2d 936, 940-945 (files Nos. 3766-ER-ML-66; 4609-ER-CP-68; 4610-ER-CP-68); *Chromalloy American Corp.*, experimental licenses for stations KB2XGW and KB2XFL (files Nos. 4536-ER-PL-68 and 4482-ER-PL-68).
⁷ See, e.g., *Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 15971*, 1 FCC 2d 453, 465-466.

from another market (*Second Report*, 2 FCC 2d at 778-781), or any disparate situation with respect to copyright liability, and would be less likely to duplicate the programs of local broadcast stations." (*Ibid.*)

14. There are, of course, other important considerations, as we recognized in *San Diego* (13 FCC 2d at 505): "such as whether television broadcast service would be adversely affected through a siphoning-off of popular program material now or potentially available on the free service or a loss of audience and advertising revenue; whether measures are needed to avoid an undue concentration of control of the media of mass communication; and whether CATV systems should be subject to requirements in the nature of section 315 of the Communications Act (equal time for political candidates), section 317 (sponsorship identification), and the 'fairness doctrine' (fair presentation of both sides of controversial issues of public importance), etc." However, the Commission's authority to regulate the use of broadcast signals as a base for CATV program origination encompasses power to adopt regulations reasonably designed to prevent such operations from having detrimental consequences to the public interest and to promote their development along lines likely to maximize the potential benefits to the public. On balance, we think that CATV origination offers sufficient promise to be encouraged. The proposed rules discussed below are the minimum measures we believe to be presently essential or desirable in the public interest.

Required origination

15. The Commission is proposing, first, to condition the carriage of television broadcast signals (local or distant) upon a requirement that the CATV system also operate to a significant extent as a local outlet by originating. In allocating frequencies and granting broadcast licenses, the Commission has long sought to effectuate the goal of section 307(b) of the Communications Act by having as large a number of local outlets in as many communities as possible. We have noted above the potential contribution of CATV in this respect, both as a means of providing a local outlet to communities which have no television broadcast outlet of their own and as a means of enhancing diversity in communities which do have broadcast outlets. We have also previously determined that the Commission's concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies. *Shen-Heights TV Association*, 11 FCC 2d 814; *Midwest Television, Inc.*, 13 FCC 2d at 502-503, 510.

16. We think it generally appropriate to condition CATV's use of broadcast signals upon a requirement that it further the allocations policy of achieving a multiplicity of local outlets. There may, however, be practical limitations stemming from the size of some CATV systems. Accordingly, consideration will be given to exempting the smallest systems. Comments are requested as to a reasonable cutoff point in light of the cost of the equipment and personnel minimally necessary for local originations. (See also par. 26, below.)

Economic basis for origination—Advertising

17. We turn now to the complex issue of regulation of advertising material in connection with CATV origination. The Commission has reached no definitive conclusion as to the number of possible alternatives here. One, of course, is no regulation at all of this aspect. Another proposal would be to adopt rules along the lines of the provision in the San Diego order, which would generally prohibit CATV systems from carrying the signal of any television broadcast station if the system originates advertising material (except as indicated in par. 26, below). In placing this condition on the San Diego test of CATV program origination, the Commission set out specific grounds (*Midwest Television, Inc.*, 13 FCC 2d at 508), which are pertinent to this general proceeding and need not be repeated here. We seek to explore in this proceeding all aspects of the above-cited factors, including the effect of originations with advertising upon the viability of stations in both the top-100 television markets and in the smaller television markets, as against the effect of any prohibition of advertising upon originations by CATV systems. In that respect, we wish to explore fully the issue of financing of original programming on CATV systems and particularly whether subscriber fees could afford an ample financial base for such operations.* There is also the possibility, as an alternative or as a supplement, of CATV originations on a per program charge of higher monthly fee basis. There is the further approach of permitting limited commercials, such as only at natural breaks, with no interruption of program material. Persons commenting on this aspect and paragraph 18 below should address themselves to the following situations: (1) communities with no broadcast service; (2) communities served by a radio station(s), but not a television station; (3) smaller television markets; and (4) major television markets. We also seek information as to existing advertising by a CATV system, the experience of broadcasters with respect to such advertising, the rates charged, and the nature of the advertisers; e.g., are the advertisers new to television or have they previously utilized television and/or radio broadcast facilities?

18. Assuming that there were a prohibition on commercials, there is then the issue whether such a prohibition should apply to CATV systems in communities which receive no television broadcast service, or only one such service, and which may therefore have a shortage of advertising outlets. Comments are invited as to any special considerations pertaining to such areas, including the effect of a possible exception on local radio stations. We are also concerned about the situation

*For example, we request comments upon the following: If \$1 per month of the \$3 monthly fee from 1 to 2 million subscribers in a city like New York was allocated to program origination, the programming fund would amount to \$12 to \$24 million annually. If CATV network operations were supported by a portion of the monthly subscriber fees paid to affiliated CATV systems throughout the country, the resulting financial base for network program origination and interconnection might well exceed the annual amount paid by a national television broadcast network for such purposes. The three television networks together annually spend about \$750 million on programming and \$45 million for interconnection, or an average of approximately \$267 million apiece for both. Assuming widespread CATV operations in major cities as well as smaller communities and a subscriber base of 45 million of the present 58 million television homes in the Nation, \$1 per month per subscriber would provide annual funds on the order of \$540 million. The foregoing is, of course, hypothetical. Comments requested on the economic feasibility of CATV systems allocating \$1 per month per subscriber to program origination.

of the small advertiser who may not be able to afford the rates of the television broadcast media. While the proposal discussed in paragraph 26 below may be a better way of dealing with this aspect, comments are requested on the desirability of permitting CATV systems to originate advertising by small advertisers on the program origination channel, again provided that there is no interruption of program continuity, i.e., that the advertising precedes or follows the program. Further, there is the issue of the applicability of the approaches delineated in this paragraph and paragraphs 17 and 20 as to originations on any common carrier channel of the CATV system (see par. 26), and what regulation of the lessee would be necessary or appropriate. Finally, we stress that while we have reached no conclusions in this important area and will do so only after careful consideration of the pleadings, all interested persons are expressly put on notice that no "grandfathering" is contemplated. In other words, the Commission is proposing to make any rules adopted applicable, upon their effective date, to all CATV service now in existence or commenced during the pendency of this proceeding, as well as to future CATV service.

Equal time, sponsorship, identification, fairness

19. The Commission further believes that a number of important national policies, now applicable to broadcasters, are equally relevant to CATV systems engaging in program origination. At a minimum, these comprise the policies embodied in section 315 of the Communications Act relative to "equal time" for political candidates and the "fairness doctrine," section 317 relative to sponsorship identification, and the national policies relative to diversification of control of the media of mass communications. While the parties are free to suggest other relevant policies or areas for further rulemaking, we are at this time proposing rules only on these three aspects, as indicated below (pars. 20, 23-25).

20. As conditions to the carriage of broadcast signals by any CATV system which engages in program origination, the Commission proposes the following to be applicable to such originations:

(a) A rule condition analogous to section 315 of the Communications Act and section 73.657 of the Commission's rules concerning broadcasts by candidates for public office;

(b) A rule condition analogous to section 317 of the Communications Act and section 73.654 of the Commission's rules concerning announcement of sponsored programs;¹⁰ and

(c) A rule condition analogous to the obligation, referred to in section 315(a) of the Communications Act and the rules promulgated thereunder, to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

It is contemplated that the obligations imposed by these conditions would be clarified through rulings upon complaints, as in the case of broadcasters, and that they would be enforced pursuant to the cease and desist procedure contained in section 312 of the Communications Act. Finally, we also request comments upon the possible application

* Further, as in the case of previous proposals in the CATV field (see 1 FCC 2d 439, 472, par. 5b), we would expect that franchising authorities will give due regard to the fact that this matter is thus under Commission consideration.

¹⁰ The nature of this condition will be affected by the resolution of the general issue of a proposed prohibition against origination of advertising material.

to CATV operations of obscenity and lottery provisions similar to those in the broadcast field (see U.S.C. 1304, 1964; sec. 73.656).

Areas for local concern

21. The foregoing represents the Commission's proposed area of concern with respect to this aspect of origination; e.g., provisions along the lines of sections 315, 317. In other respects, the Commission intends, at least initially, to rely largely on local authorities to see to it that CATV meets local communications requirements and interests to the satisfaction of the community.¹¹ While we are proposing to condition carriage of broadcast signals on a requirement that CATV operate to a significant extent as a local outlet by originating, this obligation might be met in a variety of ways and would be an appropriate area for additional requirements by the locality. Although we think commendable the suggestion that municipalities reserve some channel capacity for their own use without charge, a requirement of this nature is appropriately the function of local or State franchising authorities.

22. Cable television service has tended to develop on a noncompetitive, monopolistic basis in the areas served. The normal protection afforded consumers by providing a choice between alternative suppliers has not, in most instances, been available to the cable television subscriber. This consideration involves such matters as quality of service and repair, the reasonableness of the rates charged, technical standards, and so forth. Such protection has traditionally been provided the public by some form of government regulation of monopoly services. We do not now urge the application of our jurisdiction to the licensing of CATV systems by the FCC. We do, however, believe that local, State and Federal governmental agencies must face up to providing some means of consumer protection in this area. While we recognize that other problems are involved (such as rates to the public and regulation of any common carrier activities of CATV operators, see par. 26 below), it follows that local entities, either at the State or municipal level depending on State law, should—among other things—be concerned with various licensing considerations pertinent to the public interest, judgment to be made by the local authority—e.g., the legal, technical, financial, and character qualifications of the franchise applicant; the area to be served; the showing as to plans or arrangements for pole-line attachments with a public utility or arrangements with a common carrier or other appropriate feasibility plans; the provision of channels for public or municipal use. Such regulation, while called for in the case of present CATV operations, would be particularly appropriate in light of CATV operations with originations. Indeed, a question is presented whether these are matters as to which we should strongly urge local consideration or should make their consideration and disposition by local authorities, where appropriate under local law, a condition for the carriage of broadcast signals. Finally, in those relatively few instances where there need be no local franchise con-

¹¹ The reporting requirements discussed *infra*, the Commission's complaint procedures, and the statutory cease and desist procedure would, however, provide a check against flagrant abuse of the conditions on carriage of broadcast signals. The Commission would, of course, assume an active enforcement role with respect to the requirements relating to sections 315, 317, and diversification of control.

sideration, we request comments on whether Federal consideration is not then appropriate, and if so, our authority so to proceed (see secs. 2(a), 3(b) (d) and (e), and 301 of the Communications Act of 1934, as amended). We specifically invite comments on the matters discussed in this paragraph from interested State and local authorities, such as the mayors of CATV communities.

Diversification

23. In the area of diversification of control of the media of mass communications, the Commission is proposing three measures, particularly in view of the origination aspect discussed above. Here again, we stress that no grandfathering is contemplated, although consideration will be given to the question of affording an appropriate period within which compliance with the first two requirements is to be achieved. We are proposing, first, to prohibit cross-ownership of television broadcast stations and CATV systems within the station's grade B contour. While the grade B contour appears to be an appropriate standard in view of the Commission's policy of encouraging television broadcast licensees to establish translator facilities in pockets of poor reception within that contour, comments are invited on the desirability of prescribing some other area, such as the 35-mile zone (see pt. IV herein). Comments are also requested on the desirability of prohibiting cross-ownership of CATV systems and all broadcast facilities (including radio) assigned to the same community, and what consideration, if any, should be given to ownership of other local media, such as newspapers."

24. Second, the Commission is proposing rulemaking in the area of multiple ownership of CATV systems. It is contemplated that such rules would limit the total number of systems on a nationwide basis, based on the number of subscribers, the size of the communities, and the regional concentration. In other words, in addition to prescribing the maximum number of CATV systems which any one entity could own, or have an interest in, based upon the number of subscribers and the size of the communities, the proposed rules would limit the number of these that could be located within the same State or adjoining States (taking into account again the number that could be located in major metropolitan areas—e.g., there clearly should be a prohibition of common ownership of CATV systems in cities—i.e., the standard metropolitan statistical area—such as New York, Los Angeles, and Chicago). Comments are requested on the desirability of counting commonly owned systems within the same standard metropolitan statistical area as one system for some or all purposes. In addition to submitting suggestions as to appropriate limitations and the nature of the interest to be counted, interested persons are invited to address themselves to our view that smaller limitations should obviously apply if the CATV operator also has broadcast interests, particularly in television broadcasting.

25. The third measure stems from the Commission's concern, particularly in view of expanding cable-channel capacity, that any one

* ²³ Comments filed in docket No. 17371 (32 F.R. 6221) will be considered in this proceeding.

entity should have control over what programming is presented to the public on a large number of channels. We are therefore proposing to limit the number of channels on which CATV originated programming may be presented to one, not including any channels devoted to services of an automatic nature such as time and weather, news ticker, stock market ticker, etc.¹³ As to the latter automatic services, we raise the issue whether they should not be subject to displacement, if demand develops among channel lessees (see par. 26 below). Moreover, to the extent that scarcity of CATV channels is presently a factor, a limitation on the number of channels devoted to CATV origination would facilitate operations of the nature next discussed.

Common carrier operations

26. We believe that the public interest would be served by encouraging CATV to operate as a common carrier on any remaining channels not utilized for carriage of broadcast signals and CATV origination. This would provide an outlet for others to present programs of their own choosing, free from any control of the CATV operator as to content except as required by the Commission's rules or applicable law. It might also provide a low cost outlet for political candidates, possibly advertisers, programs on a subscription basis, and various modestly funded organizations and entities in the community who may be unable to afford time on or obtain access to broadcast facilities. And it might further provide a means for municipal authorities to fulfill any of their communications needs that are not sufficiently met through CATV's obligation to act as a local outlet. We do not here propose to condition CATV's carriage of broadcast signals on a requirement that it operate as a common carrier on some channel or channels.¹⁴ We simply point out that, subject to necessary State or local authorization and regulation, the CATV operator may do so, if it chooses. Indeed, this is another area where a local or State requirement might appropriately be imposed.

Reporting requirement

27. There are two further areas of proposed rulemaking that appear to warrant exploration at this time. One is the matter of requiring CATV operators to file information on a regular basis. In the *Second Report* the Commission called for a single submission and deferred the question of regular filings pending consideration of the responses to its questionnaire (FCC form 325). *Second Report*, 2 FCC 2d 725, 765; *Memorandum Opinion and Order* denying reconsideration, 6 FCC 2d 308, 322-323. The information then submitted is now, of course, out-of-date. In order to enable the Commission to keep abreast of CATV developments and fulfill its responsibilities in this field, as well as to assist the Congress in its consideration of any legislative proposal, we think it essential that there be periodic filings by CATV operators.

¹³ The proposed rule again would be in terms of a condition upon carriage of broadcast signals.

¹⁴ Since the areas of general inquiry set forth in pt. V above may be pertinent in this respect, we think that consideration of this question should be deferred to a later stage in this proceeding.

28. The Commission thus is proposing to require by rule that CATV operators file annual reports which will provide current information on such matters as the location of the system, number of subscribers, channel capacity, broadcast signals carried, extent, and nature of program origination, any other operations conducted on the system, financial data, ownership, and interests in other CATV systems, broadcast media and other business interests. As a starting point, comments are requested as to what additions, deletions, or other changes in FCC form 325 (app. A hereto) would be appropriate in light of the matters discussed in this *Notice*. Interested persons are also requested to address themselves to the possibility of an abbreviated form for smaller systems, the appropriate cutoff standard, and the minimum information that should be obtained from such systems. Comments are further requested on whether CATV systems should be required to keep records, available for inspection, to assist the Commission in enforcing the rules proposed in paragraph 20 above, and if so, the appropriate nature of such records.

Technical standards

29. The second area of proposed rulemaking is the question of technical standards for CATV systems. It has been repeatedly suggested that the Commission should undertake to prescribe uniform technical standards to further high quality service to the public, both broadcast signals and CATV originated material, and compatibility among systems for purposes of interconnection. In the *First Report*, we declined to do so for carriage of broadcast signals, noting that minimum standards might fall short of what could be voluntarily achieved by the CATV operator and that the development of appropriate technical criteria would take some time (38 FCC 683, 731). While the matter of technical standards was included in docket No. 15971 (1 FCC 2d 453, 476), the Commission is not yet in a position to propose specific criteria.

30. We think the time has come to make a start in this direction. Accordingly, interested persons are invited to make concrete and detailed suggestions as to what technical criteria might appropriately be prescribed. After consideration of the comments, the Commission may establish a committee to assist in the formulation of specific proposed criteria. Persons commenting on this aspect should indicate in their comments whether they would be interested in participating on such a committee. In any event, it is contemplated that a further notice will be issued proposing specific criteria prior to the adoption of any rules prescribing technical standards.

IV. Proposed Rules Relative to Importation of Television Signals

A. BACKGROUND CONSIDERATIONS:

31. The Commission has previously considered the question of integrating CATV in an appropriate and fair manner in the national television system in two recent reports—the *First Report and Order in Dockets Nos. 14895 and 15233*, 38 FCC 683 (1965), and the *Second Report and Order in Dockets Nos. 14895, 15233 and 15971*, 2 FCC 2d

725 (1966). We recognized the important contribution which CATV can make; for example, by bringing much needed television service to areas where reception of off-the-air signals is poor or nonexistent because of terrain or distance from a television market. (*First Report*, supra, at pp. 698-699.) We sought to promote this contribution by making microwave facilities available to the CATV systems. At the same time, in order to insure the establishment and healthy maintenance of the local television broadcast service—so vital to the public interest for the reasons set forth in paragraphs 44 and 45 (*First Report*, at p. 699)—we specified that the CATV system using microwave facilities must carry the local signal and must afford same-day nonduplication protection to the programming of the local stations. In this way, the local station would continue to have access to the television set of the CATV subscriber, and its audience for network programming would remain largely unfragmented—factors which we believed would contribute substantially to the station's continued healthy local service to all the people within its area. In the *Second Report* we extended these requirements to all CATV systems, whether or not they use microwave, and our authority to regulate the nonmicrowave system was sustained in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). Finally, in the *Second Report*, we considered the economic impact and unfair competition issues raised by the entry of CATV, operating with distant signals, on television broadcast service in the major markets, particularly on the establishment and healthy maintenance of the new UHF stations coming on the air as a result of the all-channel television receiver law. Because the nonduplication requirement is wholly ineffective in affording protection to the independent (nonnetwork) programming of such new stations, we devised the so-called major market, distant signal policy, discussed in the next paragraph. We further stressed that we would revise our rules as we gained added insight and experience. The purpose of this part of the *Notice* is to set forth proposed rule revisions, based upon that experience. We shall discuss, first, revision of the major market policy, and then our proposed policies in the smaller television markets.

B. IMPORTATION OF SIGNALS IN MAJOR MARKETS

32. The Commission is thus proposing rulemaking to revise the procedure adopted in the *Second Report and Order in Dockets Nos. 14895, 15233 and 15971*, 2 FCC 2d 725 (1966), relative to the carriage of television broadcast signals by CATV systems in major markets. Under section 74.1107, no CATV system may carry a distant signal—i.e., a signal carried beyond the grade B contour of the station—within the grade A contour of any station in the 100 largest television markets except upon a showing in an evidentiary hearing that such operation will be consistent with the public interest and, particularly, the establishment and healthy maintenance of television broadcast service in the area. We are here proposing, principally, to substitute a definitive policy for the evidentiary hearing procedure and for this purpose to replace the grade A contour with a mileage zone.

33. The major market hearing procedure was based on two main concerns: (1) That a CATV growth of substantial order in major markets might have a serious adverse impact on the development of UHF independent stations in these markets, thereby jeopardizing the achievement of an effective and equitable nationwide system of local television outlets—the goal of the all-channel receiver legislation; and (2) That, in view of the disparate position of broadcasters and CATV systems in acquiring programs in the TV program distribution market, these independent stations might face substantial competition of a patently unfair nature against which the same-day nonduplication requirement would be of virtually no assistance. (*Second Report*, 2 FCC 2d at 770-781.) Upon the basis of the record compiled in that proceeding, the Commission was unable to resolve the critical dispute as to whether CATV growth in major markets would in fact be substantial. (*Second Report*, 2 FCC 2d at 773.) It concluded that these questions should be explored and resolved in evidentiary hearing before CATV operations became entrenched, in view of the impracticability of effective action to roll back an established operation upon which the public has come to rely. (*Second Report*, 2 FCC 2d at 782.) The Commission further stated (2 FCC at 786): "As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as experience dictates."

34. In the 2½ years since the *Second Report* was issued, the Commission has gained more experience with the matter of potential CATV penetration in major markets and the probable effect on potential UHF development. For example, the then existing uncertainty as to whether CATV growth in major markets would be minimal or substantial has been removed by the San Diego hearing and other proceedings involving areas which receive three full-network services. (*Midwest Television, Inc.*, 13 FCC 2d 478.) The San Diego proceeding established that potential CATV penetration is likely to be substantial, on the order of half the homes in that market (*Midwest*, 13 FCC 2d at 490-491). We were also convinced that a penetration of this order could pose a real threat to UHF development and that the unfair competition would be significant (13 FCC 2d at 492-502). San Diego, as the 50th market, is not a fringe sample but rather fairly typical of the top 100 markets as a whole. Finally, the Commission in *Midwest* pointed out that its longstanding allocations policies do not contemplate that a major television market should become, to a significant extent, merely a satellite of another major market for television purposes, since that would thwart the local service concept of the Communications Act (see secs. 307(b), 303(h); see legislative history of sec. 303(s); *Second Report*, 2 FCC 2d at 770-771). As stated in the *Midwest* case (13 FCC at 501), if such a result were deemed in the public interest, the Commission would follow the direct approach of granting increased height and power to stations in the largest communities and authorizing them to operate translator and satellite facilities in other sizable communities.

35. With this experience as background, we have re-examined one of the fundamental policy questions in this area—the element of un-

fair competition. This facet was discussed at length in the *Second Report*, 2 FCC 2d at 778-781. We pointed out that because CATV presently stands outside the competitive TV program distribution market (pars. 132-133, *Second Report*), an anomalous and completely unfair situation is presented. Namely, the UHF station has no protection against duplication by CATV systems bringing in distant signals of its film programming upon which it depends for an adequate economic base to serve as an outlet for local expression for all the people in its service area (par. 134).¹⁵ And, even more important, both the CATV system and the broadcast station are large scale operations competing for audience—yet the one pays for its product and the other, without any payment, brings the same material into the community by simply importing the distant signals (par. 135, *Second Report*). Similar anomalies in the field of sports telecasts were pointed up (par. 136). We found that while “on its face, this competitive situation would appear to be a most unfair one,” no final determination could be made until further exploration in the hearing process, since “it may be that whatever the disparate conditions for operation, there is no need for concern because the CATV will not significantly affect the development or healthy maintenance of UHF broadcasting service.” (2 FCC 2d at pp. 780-781.)

36. The experience we have obtained in the hearing process now affords us the answer: CATV operating with distant signals can achieve significant penetration figures in the major markets—most probably in the order of 50 percent. (See *Midwest*, supra.)¹⁶ With such penetration, the unfair competition of CATV, described above, will be a significant factor in the development or healthy maintenance of television broadcast service. We stress here that we are not focusing on the issue of whether CATV operations with distant signals will kill or severely cripple UHF operations—but rather believe that it is sufficient to find that the unfair competitive effect is a significant one, in view of the very significant penetration figure, and therefore should be eliminated under the public interest standard of the Communications Act.

37. The latter point also deserves stress. We are not proceeding on some notion of unfair competition from the viewpoint of the Federal Trade Commission Act or the *Compco* or *Sears* cases (*Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234; *Sears Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225). Nor are we concerned here with unfair competition from the aspect of the copyright owner. Rather, our concern is the public interest in the broadcast field—“the larger and more effective use of radio” (sec. 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. 303(g)). See also *Black Hills Video Corp. v. United States*, 399 F. 2d 65, 71 (C.A. 8). That being the case, we must proceed to consider regulations to eliminate this aspect of unfair competition. See *United States v. Southwestern Cable Co.*, 392 U.S. 157.

¹⁵ The same-day nonduplication requirement is not effective to avoid the element of unfair competition. *Second Report*, 2 FCC 2d at 769-769; *Memorandum Opinion and Order* denying reconsideration, 6 FCC 2d 309, 313, 315, 317. We declined to “explore any fundamentally different approach while the copyright question is being actively considered by the Congress and the courts and before the outcome is known.” (6 FCC 2d at 317.)

¹⁶ Indeed, even the CATV systems in *Midwest* estimated a 33-percent figure, again establishing CATV as a significant factor. Thus, no one seriously argues that CATV, operating with distant signals, will not achieve significant penetration in the major markets.

Requirement for retransmission consent of the originating station

38. We believe that the most appropriate and simplest way to eliminate this element of unfair competition is by adoption of a rule permitting the importation of distant signals, but requiring the CATV system which proposes to operate with distant signals in a major market to obtain retransmission consent of the originating stations. See the proposed rules relative to this part set forth in appendix C hereto. Such a rule would parallel section 323(a) of the Communications Act, which is applicable to broadcast stations (but not to CATV systems; see *First Report*, 38 FCC 683, 704) and which has been effective in dealing with the similar problems raised by analogous auxiliary services such as translators, boosters or satellites. We therefore seek to explore in this rulemaking whether the Commission, by rule, should follow the general congressional guidance in section 325(a) by adopting a retransmission requirement for CATV systems in the above-noted situations, and thus eliminate the unfair competitive aspect through direct application of market forces now operative as to analogous services. The alternative of adopting detailed nonduplication requirements effective as to non-network programs appears to us to be less desirable than the above simpler device of permitting market forces to eliminate the unfair competition.¹⁷ It may be that a retransmission regulation will not be fully effective or may have drawbacks not now foreseen, requiring further revision or rulemaking. The purpose of this proceeding is to obtain all such relevant information, so that we may be in a position to make an informed judgment as to what regulation would best serve the public interest.¹⁸

39. While we believe that we must proceed to take appropriate steps to end the unfair competition aspect, both for reasons discussed above and within (par. 41), we are also cognizant of other important developments which we should take into account. We refer specifically to important congressional developments in the copyright field that bear directly on this issue of unfair competition. Congress is much interested in enactment of a new copyright act, the House having passed H.R. 2512 in the 90th Congress and the Senate being actively engaged in consideration of such a measure. Following the Supreme Court's decision in *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390, there are substantial indications that in the 91st Congress there will be enactment of a copyright law providing for a fair

¹⁷ With the adoption of such a requirement, there might be some need, upon appropriate occasions, of Commission review (cf. *Memorandum Opinion and Order in Docket No. 9808*, 17 F.R. 10309, 10310; Commission letter to station KLTU, Tyler, Tex., and station KSLA, Shreveport, La., FCC 64-942, Oct. 14, 1964).

¹⁸ Our proposal, with one exception noted below, is limited to the major markets. In the smaller markets, where there may well be a need for supplementary services, our general policies have sought to promote auxiliary services, including CATV operation. Thus, besides our microwave policies, we have supported the concept in the then pending copyright bill (H.R. 2512, 90th Cong.) that CATV systems operating in inadequately served areas should be able to bring in signals on a reasonable compulsory licensing basis. See letter to Chairman Staggers on H.R. 2512, dated Mar. 31, 1967. In line with that policy, we do not propose the retransmission requirement on an across-the-board fashion for the smaller television markets. Rather, we shall rely there upon the new proposals discussed within (pars. 56-58) and upon the nonduplication requirement, which is effective as to the substantial network programming of the stations in these markets, which are uniformly affiliated with networks. Where the system would propose to bring in signals in addition to those permitted under the proposal set forth in par. 57, the retransmission requirement would be applicable. In short, we seek to facilitate CATV operation in the smaller markets in a fair and appropriate manner.

many reception points will soon be realized domestically and that lower interconnection charges will encourage the development of a fourth network, regional networks and additional nonnetwork program sources for stations. In short, for so long as the achievement of an adequate commercial television system—"available, so far as possible, to all people of the United States" (sec. 1 of the Communications Act)—is dependent significantly upon the development of UHF, it would appear that as a minimum we should strive to preserve a fair opportunity for achieving additional local services on the UHF channels allocated to the top 100 markets. (See *Second Report*, 2 FCC 2d at 770-771.)

45. There are further important considerations here: Thus, while as stated there is an argument concerning the likelihood of UHF independent stations as we go below the 50th market, we think it important to eliminate the unfair competition factor vis-a-vis all stations in as many markets as possible. Though competing considerations should be weighed in underserved areas and thus different policies developed there (see pars. 57 and 58), the top 100 markets generally do not fall in this category. (*Second Report*, 2 FCC 2d at 783.) Moreover, we are here concerned with what should be in our proposed *Notice*, keeping in mind that we wish to process during the pendency of the rulemaking proceeding (see par. 51, *infra*). This, in turn, clearly calls for adherence to the 100 largest television markets, since while we can always open a market to unrestricted CATV operation with distant signals (i.e., operation without retransmission authorization), it is difficult, and indeed could be impracticable, to halt or roll back such an operation, once entrenched. See *Second Report*, 2 FCC 2d at 782; *Memorandum and Opinion on Reconsideration*, 6 FCC 2d 309, 317.

46. Finally, we are also seeking to encourage a new kind of CATV operation in the largest markets—one which may well bring a new dimension of diversity to these markets. See part III of this *Notice*. That being so, there is also the fundamental policy question whether the public interest in the relatively large markets—i.e., the 100 largest—would be better served by CATV operating in the new fashion, as is proposed in part III of this *Notice*, and as we are seeking to promote in San Diego, the 50th market, or by CATV operations with distant signals, without the requirement of retransmission consent. We recognize that this is a complex issue, and request comments thereon. It is however, an additional policy reason for adhering to the 100 largest markets during this period while the matter is being resolved.

47. We have also determined that it would be more appropriate, in the interest of a clear and definitive rule, to list in the rule the relevant major television markets, on the basis of the 1967 rating of the American Research Bureau (ARB) based on net weekly circulation.²¹ The ARB rating may vary somewhat from year to year, and this could be most disruptive in the few markets involved. We therefore propose the definitive and fixed list. We have also set forth in our proposal the

²¹ While the 1968 ratings have now been issued, we think that it would cause less disruption to continue to use the ratings which have been in effect during most of the last year.

note, have imposed a considerable burden upon the Commission and the participating parties.

42. In sum, the Supreme Court has sustained the Commission's jurisdiction over CATV systems and its authority to take regulatory action "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." (*United States v. Southwestern Cable Co.*, supra, at 178.) We conclude that it would not be consistent with such responsibilities to permit the growth of substantial CATV operations carrying distant signals in major markets until the aspect of unfair competition is eliminated.

43. Accordingly, the Commission proposes to close down the burdensome major market hearings except for those few involving issues other than impact upon the local broadcasting stations, where hearing on such issues might still be appropriate, and to proceed to elimination of the unfair competition aspect, either upon the basis of this rule-making proceeding or upon congressional action on copyright-communications legislation. The Commission therefore proposes to adopt a policy, embodied in the attached proposed rules, which will clearly delineate the areas where carriage of distant signals is authorized only upon satisfaction of the requirement for retransmission consent of the originating station. The proposed major market rules would apply across the board and do away with the necessity for case-by-case consideration in evidentiary hearing or upon petition for waiver. Should the rules be adopted and then there be enactment of a new law, the Commission would, of course, reconsider its regulations in light of the new situation and the congressional guidance.

Top 100 markets

44. We are proposing to adhere to the 100 largest television markets as the basic dividing line. These are the markets where UHF independent stations are most likely to develop and the unfair competition problem would be most significant. It can be argued that as we go below the 50th market the likelihood of imminent UHF activity becomes smaller. But fourth stations have already developed in many of the top 50 (including San Diego, the 50th market) and this could have a snowballing effect on UHF development in the markets below 50.²⁰ It has been the Commission's experience that broadcasters generally seek to enter first the markets offering the largest audience potential and then turn to smaller markets as the more attractive locations become saturated. By the same token, as noted in the *Midwest* case, if UHF's chances for success in the smaller markets are more marginal, the "likelihood of serious adverse impact from any substantial CATV penetration is correspondingly greater" (*Midwest Television, Inc.*, 13 FCC 2d at 493). Moreover, the increasing availability of programming for independent stations in the top 50 markets may well stimulate new independents in the 50-100 markets. In addition, it is hoped that the promise of satellite technology as an economic means of providing service from one transmission point to

²⁰ We note that considerable interest has been expressed in the UHF facilities allocated to the top 100 markets. See app. B hereto.

and reasonable revision as to CATV. Such a revision may well reflect not just copyright but also communications and antitrust policies (see *Fortnightly* case, 392 U.S. at p. 401). Indeed, section 111 of H.R. 2512, dealing extensively with CATV copyright matters, was not passed by the House largely because it had not been considered by the committee charged with communications policy. (See 113 Congressional Record H3624-3626; 3636-3637, 3644-3647, 3857-3859; cf. *Fortnightly Corp. v. United Artists*, 392 U.S. at 401, footnote 33.) In short, any revision, dealing as it must with concepts such as adequately and inadequately serviced areas, originations, etc., might well be a meld of copyright, communications and antitrust policies. It would thus constitute, to a significant degree, the legislative guideline which the Commission has long sought and would welcome in an important new field such as CATV.¹⁰ The Commission would, of course, cooperate fully in this most important congressional endeavor.

40. As stated, we must take the above consideration into account. For, our retransmission proposal, while stemming from our responsibilities under the Communications Act (see *United States v. Southwestern Cable Co.*, supra), necessarily also embodies considerations like copyright in its practical applications. (Cf. *Report on Rebroadcasting*, 17 F.R. 4711, 17 F.R. 10309.) Since Congress is considering the copyright matter, we should afford the opportunity for congressional resolution of the unfair competition aspect, particularly since, as discussed, such resolution would constitute the congressional guidance sought in this important area. We therefore propose to proceed with our rulemaking proceeding, to obtain comments and reply comments, and to be in a position to take definitive action. We shall, however, not take such action until an appropriate period is afforded to determine whether there will be congressional resolution of this crucial issue of unfair competition, with indeed congressional guidance in this whole field.

41. In view of the foregoing, it is clear that our policy of holding evidentiary hearings in the top 100 markets should be revised. First, the hearings have served their purpose, by giving us added insight. In the light of that insight and the conclusion we now reach on the unfair competition aspect (par. 36, supra), continuation of the hearings on the economic impact issue would serve little useful purpose. The unfair competition aspect must be eliminated. When it is eliminated, a new type of CATV operation would appear likely to eventuate in these major markets. Indeed, this new type of CATV operation is largely the basis for other parts of this Notice. (See pts. III and V.) Whether or what further regulation of this new type may be necessary because of other public interest considerations, we cannot say, since we cannot now foretell precisely the nature of the new operation, nor, if it should eventuate, the congressional guidance embodied in any new copyright-communications legislation. Clearly, then, it makes little sense to continue these lengthy, complex evidentiary hearings on the economic impact issue—hearings which, we also

¹⁰ See, e.g., *Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 15971*, 1 FCC 2d 453, 464, 465-466; *Second Report*, 2 FCC 2d at 734, 737.

name of each community in the market from which a 35-mile zone is to extend, where we believe it to be appropriate in view of the nature of the market.

Fixed mileage standard

48. We are also proposing to adopt a mileage standard, in place of the grade A contour, for measuring the area in which carriage of distant signals is permitted upon the retransmission consent condition. The predicted grade A contour varies from station to station and may go out as far as 60 miles from the station's transmitter. A fixed mileage standard, which would be adhered to in every case, would have the advantage of administrative ease and provide certainty to the affected industries. A zone measured by air miles from the main post office in the designated market community can be readily calculated without resort to contour maps in the Commission's files or the necessity for evidentiary hearing to resolve disputes. The zone proposed in the attached rules is the area extending 35 miles from the main post office in each of the market cities designated in the major market listing. This would protect the essential area for stations' development in the market against unfair competition, largely avoid the cumulative impact aspect, and preserve the basic integrity of the major markets from an allocations standpoint. In connection with this latter aspect, we stress that from a practical or allocations standpoint, it makes no sense to preserve the main city itself and let CATV operate with distant signals (without the retransmission consent being required) in adjacent or relatively nearby smaller communities. Rather, proper allocations procedure calls for this adoption of an appropriate zone around the main city or cities, with all TV homes within the appropriate zone treated alike. Finally, we note that the 35-mile zone accords generally with our waiver practices under the present section 74.1107(a).

"Footnote 69" situations

49. We are proposing further to codify in the rules the so-called "footnote 69" situation; i.e., where a central metropolitan area of one major market falls within the predicted contours of stations in another major market, so as to avoid the San Diego type of hearing and preserve the local character of such markets against the element of unfair competition. For this purpose it appears that the same 35-mile zone may be appropriate. The attached rules would prohibit a CATV system operating in a community located wholly within the 35-mile zone of a television station in a major market from carrying the signal of a television station in another major market unless the community of the system is also located wholly within the 35-mile zone of the station in the other market or unless the retransmission consent requirement is fulfilled. This would eliminate the unfair competition aspect as to the local market stations in the essential area where their off-the-air signals are of higher grade than those from the other market, while not affecting CATV carriage of signals from both markets in the area where such signals are of approximately equal grade or in the area which lies outside the 35-mile zones. And, here again, allocations policies would be furthered. (See discussion, par. 48,

supra.) We recognize that arguments can be advanced for other mileage proposals—for example, for a 40-mile zone, with a 30-mile zone in the "footnote 69" situation, or for an across-the-board 30-mile zone. It is our tentative judgment that the 35-mile zone is most appropriate, and we have therefore used that standard in the proposed rules (and also as our interim guideline—see par. 51). We specifically invite comment on this aspect.

50. We also recognize that in drawing lines of this nature there will inevitably be some borderline cases which might more appropriately fall on the other side of the line. But the thrust of the proposed rules is to cover the crux of this matter, rather than to achieve a multiplicity of refinements tailored to the precise circumstances of all conceivable situations. The latter course would simply perpetuate the present burdensome hearing and waiver procedure with its unpredictable consequences. We think that the goals of certainty and administrative ease to be obtained from strict adherence to a definitive policy outweigh any advantages that might flow from flexible administration with its attendant drawbacks. Therefore, the proposed rules do not contemplate the grant of waivers.²²

Interim procedures

51. We turn now to the procedure to be followed by the Commission while this rulemaking is pending. Effective upon the issuance of this notice, the Commission will halt the hearing process in all top 100 market proceedings (including those with a "footnote 69" issue) wherever it stands, even at the Review Board or Commission level.²³ There is no point in requiring the parties and the Commission to expend the resources and effort necessary to continue such hearings if the definitive policy is to supplant that process. We will also stop processing petitions for waiver of the hearing requirement. However, parties to pending hearings, and those who have pending petitions for waiver, or who desire to file new petitions for waiver of the existing section 74.1107(a), may request authority to commence distant signal operations which would be permissible because they fall outside the zones in the attached proposed rules. The Commission will grant such requests only if they are entirely consistent with the proposed rules. We believe it appropriate to proceed this way, since, as stated, waiver policies under the existing rules have largely paralleled the proposed 35-mile zone. Action on all other requests for authority or petitions for waiver to carry signals coming within the hearing requirement of the existing rules will be held in abeyance pending the outcome of this proceeding. We would, however, consider the authorization, during this interim period, of some operations within the proposed 35-mile zone by systems which would operate in accordance with the retransmission consent requirement of the proposed rules. We believe that authorization to effect this waiver in some instances would give us valuable information concerning the actual operation

²² We have in mind the past situation where waivers were sought in the ordinary course pursuant to sec. 74.1109. The provisions of sec. 1.3 of the Commission's general rules of practice and procedure are applicable, of course, to every rule of the Commission.

²³ We will, however, consider the appropriateness of resolving issues in hearings which do not involve the question of impact upon broadcasting stations.

of systems under the proposed rules and thus would assist us in resolution of the rulemaking.

52. CATV systems now carrying grade B signals from a major market within the grade B contour of a station in another major market, or those proposing to do so, are not proscribed by the existing rules except where the filing of a timely section 74.1109 petition continues the operative effect of section 74.1105(c). Commission action on pending and future section 74.1109 petitions of this nature will be held in abeyance pending the outcome of this proceeding. However, a CATV system may request relief from the proscription of section 74.1105(c) in order to carry such signals in areas which would be permissible under the attached proposed rules. Such relief will be granted only to the extent that the request is entirely consistent with the proposed rules and with the public interest, as evidenced by the considerations in the particular case.²⁴

53. We are proposing to "grandfather" the present service of CATV systems which would otherwise be prohibited or restricted by the proposed rules, in order to avoid substantial disruption to the CATV subscribers.²⁵ The proposed grandfathering date is the date of publication of this *Notice* in the Federal Register (Dec. 20, 1968). Thus, any rules adopted would be applicable upon their effective date to all CATV service commenced after December 20, 1968, including service not barred by section 74.1105(c). However, in the event that the rules finally adopted differ from the proposed rules, service authorized by the Commission to commence during the pendency of this proceeding will be grandfathered; also grandfathered is any service previously authorized by the Commission, whatever the commencement date of such service.

54. We believe that the proposed rules and the interim processing procedures outlined above are necessary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting and the proper dispatch of the Commission's business (sec. 4(j) of the act). At the same time, we are not unmindful of the promising potential of CATV and the cable technology as a means for increasing the number of local outlets for community self-expression, for augmenting the public's choice of programs and types of program service, and for providing a variety of other communications services. Parts III and V of this proceeding are directed toward the broader and more important questions of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of CATV for the public and what Commission actions or legislative recommendations would be appropriate to encourage such development. Those parts may well determine basic issues as to the long-range structure of the cable industry and its relationship to the broadcasting and communications common carrier industries. The proposals in this part are required by present circumstances and are interim in nature, in the sense that if relevant legislation is forthcoming,

²⁴ The procedures to be followed in filing requests pursuant to para. 51-52 of this notice, and responsive pleadings thereto, are the same as those set forth in sec. 74.1109 (b), (c) and (d) of the existing rules.

²⁵ Such "grandfathering" does not, of course, include present service which is in violation of our existing rules.

or if there are new significant industry changes or some revolutionary technological development, the Commission will of course reexamine this matter upon the basis of the new circumstances.

C. Distant signals in smaller television markets

55. We are not proposing any blanket prohibition against carriage of distant signals or blanket retransmission consent requirement in the television markets below the top 100, for the reasons already developed (see note 18, above), except as indicated in paragraph 57 below. However, we will continue to examine such markets on an ad hoc basis, upon petition filed pursuant to section 74.1109.²⁶ With the end of the hearing load in the major market proceedings, the Commission hopes to be able to devote more attention to the smaller markets and to take such action as may be appropriate (including any evidentiary hearings required to resolve disputed issues of fact) in those few instances where there is a substantial public interest showing, e.g., that a proposed new station would be independent or largely independent in operation or that the cumulative effect of existing and proposed CATV operations in the market would jeopardize the likelihood of obtaining or retaining a network affiliation or of maintaining audiences large enough to attract needed advertiser support. Most important, we are proposing to adopt rules regulating the carriage of distant signals in the smaller markets which may substantially alleviate potential problems in such markets and thus cut down greatly upon the need for any evidentiary hearings in this respect.

56. While recognizing the need for underserved areas to obtain additional services through CATV systems, the Commission is concerned lest CATV should undercut our basic allocations policies and structure by importing signals from unnecessarily distant centers or in such quantity as to unduly fractionalize the relatively small potential audience of stations in these smaller markets. Thus, a substantial question is presented as to whether it is consistent with fundamental allocations policies to permit CATV systems to engage in the practice of "leapfrogging," e.g., to bring the signals of Los Angeles stations into Texas or the signals of New York City stations into Ohio instead of carrying the signals of stations of the same type that are located closer to the system and thus are much more apt to have regional or in-State programming more attuned to the needs and interests of the community. Further, such "leapfrogging" with its concentration on the signals of the large cities such as New York and Los Angeles, raises questions of diversification of media of mass communications. To deal with these questions, we put forth for comment the proposal that communities being inadequately served should receive additional service from the nearest full network, independent and educational stations in their region, or within the same State. Moreover, a serious question is raised when such additional services are supplemented by further network or independent signals from more distant centers where the CATV system is located within the 35-mile zone of local stations providing the only television service available to persons within their service areas

²⁶ The same policy will apply also to areas outside the specified zones in the top 100 markets.

who are not served by CATV systems. There is the danger that a plethora of competing signals, brought in wholly without regard to the "fair competition" concept integral to the retransmission consent requirement, may cause a loss of deterioration of service to the substantial portion of the public dependent upon television broadcast stations—a loss which would outweigh any incremental value of the extra signals to the CATV subscribers for the reasons set forth in the *First and Second Reports*.²⁷ At least, in view of the burgeoning proposals to bring, for example, Los Angeles signals into the Mountain or Southwestern States, this is a matter warranting thorough exploration.

Within specified zones

57. The attached proposed rules would permit a CATV system operating within the 35-mile zone of a station in a smaller market to carry only such distant signals as may be necessary to furnish its subscribers (counting local signals) the signal of one full network station of each of the national television networks and one independent station,²⁸ provided that the supplementary distant signals were obtained from the closest source in the region or in the State of the system. The system could also carry the signal of any independent station that subsequently commences operation at a location closer to the system, and the signals of any in-State or nearby educational stations in the absence of objection by local or State educational interests. However, carriage of other distant signals would be prohibited, unless the CATV system has the retransmission consent of the originating stations with respect to such additional signals. See proposed section 74.1107(d) in appendix C. Based upon our experience, systems operating with the above number of signals in the smaller markets have been successful, and indeed operation with such numbers is very frequently encountered. In those few instances where a more varied operation may be appropriate, we stress again the origination aspect (see pt. III herein). The proposed limitation in this paragraph thus also complements the Commission's determination that originations serve the public interest.

Outside specified zones

58. CATV systems located outside the 35-mile zone of any station in a major or smaller market would be permitted to carry such distant signals as they chose so long as they refrained from leap-frogging; i.e., did not carry a more distant station before carrying a closer station of the same type (e.g., full network stations of the same network, independent or educational stations). Since some flexibility may be appropriate in the administration of the latter provision, the proposed rules contemplate the grant of waivers for good cause shown; e.g., that the more distant station is located in the same

²⁷In this connection, we also note that while the nonduplication requirement is effective as to network programing, roughly 45 percent of a network affiliate's time is devoted to nonnetwork material; and it is this segment which is particularly vulnerable to continued fractionalization by a plethora of distant signals.

²⁸The question of whether a station, which is not affiliated with a national network, qualifies as an independent station within the meaning of this section would be treated on petition pursuant to sec. 74.1109.

State or that the system's subscribers have a greater community of interest with the region of the more distant station. See proposed section 74.1107(e)(2). Here again the systems could, and under the proposal in part III herein, would originate. Indeed, we would expect such originations to be facilitated to some extent by the fact that nearby systems within the 35-mile zone might well be engaged in originations.

Grandfathering and interim procedures on microwave applications

59. As in the case of the major market provisions, the Commission is proposing to grandfather existing CATV service in the smaller markets and outside the specified zones, in view of the general impracticability of going back to the specified service. The proposed grandfathering date is the same; i.e., the date of publication of this *Notice* in the Federal Register (Dec. 20, 1968). Since any rules adopted will be applicable upon their effective date to all CATV service commenced after December 20, 1968, CATV systems commencing operations inconsistent with the proposed rules during the pendency of this proceeding will do so at their own risk. Many of the distant signals covered by the proposed rules would involve microwave authorizations. In view of the substantial public interest questions posed by microwave applications to relay signals which would be inconsistent with the proposed rules and in order to avoid unnecessary disruption to the public, Commission action on inconsistent applications for new microwave service to a CATV system will be held in abeyance during the pendency of this proceeding. Consistent microwave applications will be processed and considered by the Commission in normal course, and any service provided pursuant to such a grant will be grandfathered. Where the microwave application is for service to a system located outside of the 35-mile zone of any station, the Commission will consider applications containing requests for special relief along the lines contemplated by section 74.1107(e)(2) of the proposed rules in appendix C, in order to maintain its flexibility during the interim period to take action consistent with the public interest in the particular circumstances.

V. General Areas of Inquiry

60. The possibility of a multipurpose local CATV communications system, and of national interconnection of such systems (see pt. II above), raises a number of questions pertinent to the Commission's responsibilities and national communications policy, which not only must be considered in the context of the immediate issues before us relating to CATV systems, but affect other areas as well.²⁹ It is difficult to be specific in an area of rapidly changing technology and before concrete proposals have been advanced, the identity of those willing and able to provide various services has been ascertained, the services have come into being, and public demands and preferences are known.

²⁹ Some of the potential services that have been suggested for cable systems (see pt. II above) obviously could have far-reaching social and economic implications and broad impact on industries and institutions not subject to the Commission's jurisdiction. We intend to explore these issues in the context of the discharge of Commission's responsibilities.

Nevertheless, at least the following general questions occur to us initially:

(1) What is the appropriate relationship between CATV, communications common carriers, and other entities (e.g., the broadcasters, computer industry, etc.) which now provide, or may in the future seek to provide, communications services in the locality?

(2) What is likely to be the nature of the services that could be offered to the home or business under present and anticipated technology, and how would home and business requirements for communications facilities differ in light of services that might be economically practicable only for business use?

(3) Would the public interest be best served for the immediate future by:

(a) Permitting or encouraging the entry of all would-be newcomers, services, technologies, and facilities in an atmosphere of free competition, letting the market place determine the survival of the fittest, subject to such minimum regulation as may presently be required in the execution of the Commission's statutory responsibilities and to such future regulation as may become necessary or desirable in the public interest or as a result of legislation; or

(b) Permitting tests of different systems or services by different entities in various cities to afford some basis in experience for decisions as to the best ultimate structure before any particular system or service becomes established on a widespread basis; or

(c) Undertaking to devise a master plan now, before new facilities and services are inaugurated, to guide their development?

(4) Is it necessary or desirable that there should ultimately be a single cable (or bundle of cables) providing multiple means of communication to and from the home and/or business and, if so, should the complete system be owned by one entity or should there be diversity of ownership or control of some aspects of such a multipurpose communications system (e.g., joint ownership or indefeasible right of use)? What considerations should govern access to such system by communications common carriers and others offering communications services to the public? What should be the nature of the service offering by the entity or entities which would provide the cable (or bundle of cables) to the home?

(5) Is it necessary or desirable that there be multiple facilities providing means of communication to and from the home or business—e.g., some combination of radio, cable and wire—and, if so, what kinds of services should in general be provided by what kinds of facilities?

(a) Is it technically and economically feasible for CATV to provide some two-way services, particularly two-way video, and switched services to and from the home and/or business and, if so, what would be the role of such services vis-a-vis other services such as videotelephone service?

(b) Assuming that some services could be provided by the facilities of more than one entity (by communications common carriers such as the telephone and telegraph companies, by CATV or some other enterprise), should duplication of facilities and competition in the provision of services be permitted, at least initially, or should there be some allocation of services among different entities?

(c) Assuming multiple facilities owned by different entities, would it be necessary or desirable to have a common junction at the premises of the consumer to facilitate interconnection of facilities and the provision of some services one way by one facility and the other way by another facility?

(d) Assuming multiple facilities owned or controlled by different entities, would it be necessary or desirable that the entire complex (or an essential portion thereof) be engineered according to uniform standards or by one entity to further technical compatibility, efficiency and economy?

(6) What facilities would be necessary or desirable for transmission through the streets, as opposed to from the street to consumer's premises.

and what are the comparative advantages or disadvantages of radio, cable, or some other mode?

(a) Should there be a variety of intracity distribution systems or only one and, if the latter, of what nature?

(b) Assuming a single intracity distribution system and a single cable (or bundle of cables) providing access to the premises of the consumer, should the complete system be owned by one entity or should there be diversity of ownership and control of some aspects? In either event, should there be limitations on common ownership or control of facilities in different cities?

(c) Apart from the question of ownership and control of facilities, should all entities desiring to provide a communications service to the public have nondiscriminatory and equitable access to the local distribution facilities for the purpose of so doing and, if so, on what basis?

(7) How should the local communication system or systems tie into inter-city terrestrial and satellite facilities?

(8) What technical standards would be necessary or desirable to achieve national and local compatibility and good quality service to the public?

(9) How could the same communications services available to homes in the city be provided to homes in rural or other areas not now economically reached by cable?

(a) To what extent could this problem be alleviated by the use of radio links such as those involved in the experimentation of Teleprompter Corp. and Chromalloy American Corp. (see footnote 6 above).

(b) Would it be necessary or desirable for the Federal Government to subsidize construction of communications facilities in rural areas in a program akin to rural electrification?

(10) What should be the division of regulatory functions between Federal and State or local authorities with respect to the local communications system or systems; e.g., construction of facilities, terms and conditions of access by those offering communications services, services and charges to the public, licensing, etc.?

(a) Which aspects of the local system or systems would require uniformity and centralized regulation or would be important to the effectuation of national communications policies, which aspects would be primarily of local concern and appropriately subject to State or local regulation, and which aspects might better be left unregulated?

(b) What amendments to the Communications Act of 1934 might be necessary or desirable to effectuate the public interest and national communications policies in this area?

61. The foregoing merely touches on some of the questions which occur to us initially and is by no means an all-inclusive listing. Among other things, the Commission is also concerned about the effect of potential new specialized communications developments on present communications technologies and services and, particularly, the social, political, and economic considerations raised by such developments. We recognize that these questions range over a broad field. Moreover, it is apparent that the field is one of many variables, difficult to assess at this time. These questions have implications which may affect the resolution of our specific rulemaking proposals and should be kept in mind by persons commenting on parts III and IV herein. As stated at the outset, we believe that a continuing inquiry is needed, with the ability to take action at different phases as the problem becomes clarified and the need for action is shown. Accordingly, to inaugurate the discussion, interested persons are invited to comment on the questions indicated above and to suggest other problems and possible courses of action in this complex field.

VI. Miscellaneous

62. In view of the matters encompassed in this proceeding, the Commission is concurrently issuing an order terminating the proceeding in docket No. 15971. Matters at issue in docket No. 15971, which have not been resolved or which have not been specifically mentioned in this *Notice*, can be raised in this proceeding. (See, e.g., *Notice of Inquiry and Notice of Proposed Rulemaking in Docket No. 15971* (30 F.R. 6078), par. 63, concerning the effect of CATV distribution of aural signals on local standard broadcast or FM radio stations.)

63. Since the proposed rules discussed in part IV above, and set forth in appendix C hereto, are intended to embody a clear-cut and definitive policy, particularly in the major markets, interested persons are requested to point out in their comments any respects in which the proposed provisions appear ambiguous or open to factual dispute.

64. It should be noted that the Commission is proposing in appendix C to make an editorial change in section 74.1103(d) to make explicit a requirement embodied in the present rules. In the *Second Report* the Commission stated that the carriage provisions contained an implicit requirement that CATV systems "refrain from deleting or altering any portion (including advertising) of signals carried pursuant to the rules" except as required by the program exclusivity provisions (2 FCC 2d at 753, 756). The Commission further stated that it would so rule upon complaint (2 FCC 2d at 756). While no explicit statement in the rules was then deemed necessary, we now think that an express provision may be helpful in avoiding any possible misunderstanding as to the existing obligation of the CATV system.

Authority for the proposed rulemaking and inquiry instituted herein is contained in sections 2, 3, 4 (i), (j), and (k), 301, 303, 307, 308, 309, and 403 of the Communications Act; cf. also sections 315, 317, and 325(a) of the Communications Act.

65. In view of the importance and complexity of the issues in this proceeding, the Commission intends to afford oral argument at an early date to assist in crystalizing the issues prior to the submission of written comments, and may schedule further oral argument after consideration of such comments. Oral argument on all matters discussed in parts III and IV herein will be scheduled to be held during the latter part of January 1969; oral presentations may be made by interested persons (such as industry spokesmen) or their attorneys. All interested persons are invited to file written comments on the rulemaking proposals set forth in parts III and IV herein and in appendix C on or before March 3, 1969, and reply comments on or before April 3, 1969. In view of the importance of a prompt resolution of various aspects of the rulemaking proposals in part III, the Commission expects to adhere to the filing times for comments on part III, absent a compelling showing of unusual circumstances. Comments on the inquiry in part V herein may be filed on or before June 16, 1969, and reply comments on or before August 15, 1969. In reaching its decision in this matter, the Commission may also take into account

any other relevant information before it, in addition to the comments invited by this *Notice*. The Commission, after consideration of the comments, will also determine whether further oral argument should be scheduled.

66. In accordance with the provisions of section 1.419 of the Commission's rules and regulations, an original and 15 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished to the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.
15 F.O.C. 2d

(DO NOT RETURN THIS INSTRUCTION SHEET TO THE COMMISSION)

APPENDIX A

INSTRUCTIONS
(FCC Form 325)

1. The certificate is to be signed by the individual owning the system, if individually owned, by a partner, if a partnership, or by an officer of the corporation, if the report is prepared for a corporation.
2. List in Block 03 the community currently being served by this CATV system, the total population in the community, and the state and county where the community is located. If more than one community is being served, give data for each community. Record also the total number of subscribers in each community served by the system. In stating the number of subscribers, insofar as apartment house installations are concerned, count each apartment unit receiving service (estimate where the exact total is unknown). In all other instances (hotels, motels, etc.), count as one installation or subscriber. If more space is needed, continue on a separate sheet.

List in Block 04 the total population in the communities and the total number of subscribers.

3. Attached is the most recent listing of the top 100 television markets as ranked by American Research Bureau. The markets are listed alphabetically. If you have a question as to whether your system is located within the predicted Grade A contour of a television station in the largest 100 television markets, please write to the Commission. Such requests for information will be afforded expedited action.

4. If the reporting individual, partnership or corporation is a broadcast permittee or licensee and has filed the ownership report called for by the Commission's rules, then the information requested in Blocks 09, 10, 11, and 14 need not be filed. Instead, simply indicate that such information is on file with the Commission, specifying date and file number, if any.

If the reporting system is a corporation, supply the information requested of corporations in Block 08 and the succeeding blocks. The system is requested to include the information to be furnished by the other corporations named in Blocks 08e and 08f, or to indicate that such corporations have been requested to supply directly the information to the Commission.

The reporting system and each corporation listed in Blocks 08e and 08f are requested to supply for its officers or directors, whether they own stock or not, and for stockholders having an ownership interest of 5% or more the information called for in Blocks 09, 10, 11, 12, 13, and 14. If the reporting corporation does not have the information concerning the interest of stockholders owning a 5% interest or more of the appropriate corporations and the close relatives of such stockholders, it is requested that the reporting corporation furnish each such stockholder with a separate set of pages 4 through 7 of this form (with the information requested in Block 09 filled in) and request the stockholder to fill in the information requested in Blocks 10 thru 14 and file the material with the Commission. If the corporation does not have the social security or IRS information requested in Block 09, the stockholder should be requested also to fill in that part of the Block 09.

Additional sets of pages 4 through 7 of this form may be obtained from the Commission upon request. When the information is submitted separately by a stockholder or a parent corporation, the information contained in Blocks 10, 11, 12, 13 and 14 shall be certified by signing and dating page 7.

Where stock is held temporarily by a stockholder in a street name, this fact should be noted, but no further information concerning such stockholder need be furnished.

(DO NOT RETURN THIS INSTRUCTION SHEET TO THE COMMISSION)

SUBMIT ONE ORIGINAL COPY TO:

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

CATV INFORMATION REPORT

I certify that I am _____ of
(Position with CATV system)

(Exact legal title or name of the CATV system as shown in item 04.)

that I have examined this report and read the instructions; that to the best of my knowledge, information, and belief, all statements of fact contained in the report are true and the report is a correct statement of the business and affairs of the above-named respondent in respect to each and every matter set forth herein. (See Instruction No. 1).

(Signature of person certifying report)

_____ 1966

Willful false statements on this report are punishable by fine or imprisonment. U. S. Code, Title 18, Section 1001.

Federal Communications Commission Reports

CATV INFORMATION REPORT (Refer to instructions on last page of this form)									
FCC Form 337									
2 of 7									
Name and post office address of the CATV system (fill out a separate report for each CATV system)									
01	Name	Street address	City	State	Zip code				
Name and address of person to receive communications concerning this system if other than above									
02	Name	Street address	City	State	Zip code				
Service Data (Refer to instruction Number 2)									
	Community served	Population (1960 Census)	State	County	Total No. of Subscribers	Date Service Began	Total Channel Capacity		
a.									
b.									
c.									
d.									
03	e. Total population					b. No. of subscribers			
04									
Provide the following information concerning television stations carried on your CATV system									
Station call letters		City	State	Broadcast	Cable	Reception of signal (check)			
						Off-Air			
a.									
b.									
c.									
d.									
e.									
f.									
g.									
h.									
i.									
j.									
k.									
05									

CATV INFORMATION REPORT

(Refer to instructions on last page of this form)

3 of 7

Additional services. Enter under column "Now" the number of channels currently used to transmit the respective service. If you have made a public announcement of plans to provide in the future additional services, enter under the column "Announced" the number of channels you intend to use to transmit such service. Also enter the total number of hours per week [to the nearest hour] devoted and announced to be devoted to use to service. "Program Origination: Local (live) events" (block 06-e) includes any local program which uses live talent exclusively, including any local program recorded by the system for later transmission by the system. Programs furnished to the system by others are not local live programs.

TYPE	NOW		ANNOUNCED	
	No. of Channels	Hours/week	No. of Channels	Hours/week
a. Time and weather				
b. FM				
c. News Ticker				
d. Program Origination: Film				
e. Program Origination: Local (live) events				
f. Other (Specify):				

06

Top Markets Information: (See Instruction No. 3)

7a. Is the system located in a community or communities within the predicted Grade A contour of a station in the 100 largest television markets (as ranked by American Research Bureau on the basis of net weekly circulation of the largest station in the market)?

07

7b. If you have answered "Yes" to 7a, state the total number of subscribers to the system on February 15, 1966:

7c. If you have answered "Yes" to 7a, you are requested to retain in your files the information which will enable you to prepare a map showing the location, by street, of all cable lines which were being used to serve subscribers on February 15, 1966.

Yes ☐ No ☐

(Total No. of subscribers)

THE REMAINING PAGES OF THIS FORM NEED NOT BE SUBMITTED, if the total number of subscribers to the CATV System as shown in Item 7b above is less than 500 and the population of the Community served is less than 5,000.

FCC Form 323 4 of 7	
CATV INFORMATION REPORT (Refer to instructions on last page of this form)	
When stockholders named in Block 09 and corporations named in Blocks 08e and 08f submit separate sets of pages 4 through 7 of this report (see instruction 4), repeat here the name of the CATV System as it appears in Block 01:	
Organization Information	Number of persons having ownership interest in this CATV System If less than 50 give number (a) If more than 50 check box (b)
(check appropriate box to indicate type of this CATV organization)	
a. <input type="checkbox"/> Individual b. <input type="checkbox"/> Partnership c. <input type="checkbox"/> Corporation d. <input type="checkbox"/> Other	
e. Is there any corporation owning 50% or more of the stock of this CATV? If "Yes", give name of corporation:	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
f. Is the corporation named in 08e in turn owned 50% or more by another corporation? If "Yes", give the name of each such other corporation, to and including the final parent corporation owning 50% or more:	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
A separate set of pages 4 thru 7 of this form must be submitted for each corporation named in 08e and 08f above (see instruction 4)	

Name of organization reporting below:

For partnerships, list the name, social security or Internal Revenue No., address and percent of interest in the partnership of each partner. For corporations, list all officers and directors (whether they own stock or not), and stockholders who own 5 percent or more interest in the corporation. For each entry, if that person is a director, place a check mark in the space for that line in the column headed "Dir." If an officer, enter the title or principal title, if that person has more than one. If an ownership interest exists, record this to the nearest whole percent based on the total number of shares of voting stock outstanding, exclusive of treasury stock (see instruction 4).

[illegible]

CATV INFORMATION REPORT

(Refer to instructions on last page of this form)

FCC Form 325

5 of 7

Is there any close family relationship (i.e., husband, wife, father, mother, brother, sister, son or daughter) between any of the officers, directors or stockholders listed in block 09?

If "Yes", state below the names of the persons, the relationship, and the name of the related person.

Last	Name		Social Security or I R S No.	Relationship	Name of related person	
	First	Last			First	Last
10						

Yes ☐ No ☐

Is any of the corporate stock listed in block 09 held for any other person who is the beneficial owner of stock of this corporation?

If "Yes", state below the name of the beneficial owner and the name of the fiduciary.

Last	Name		Social Security or I R S No.	Name of officer, director or stockholder having a fiduciary relationship.	
	First	Last		First	Last
11					

Yes ☐ No ☐

CATV INFORMATION REPORT

(Refer to instructions on back last page of this form)

7 of 7

13 Has any person named in blocks 09 or 11 been found guilty of any felony in any federal or state court within the past 10 years?

If the answer is "Yes," submit as Exhibit No. _____ a statement disclosing the person and matters involved and identifying the court and proceeding (by date and file numbers).

Yes ☐ No ☐

14 If any of the persons listed in block 09 or 11 are aliens, submit as Exhibit No. _____ a list of their names and respective addresses.

If the information requested in blocks 10, 11, 12, 13, and 14 is submitted directly by a stockholder, as provided by Instruction No. 4, such stockholder should sign and date this page in the space indicated below.

I certify that the information contained in blocks 10, 11, 12, 13, and 14 is true and correct to the best of my knowledge and information.

(Name of stockholder if submitted for stockholder)

(Signature of stockholder if submitted by stockholder)

(Name of parent corporation supplying information directly)

(Date)

(Signature of person signing for parent corporation supplying information directly)

(Title)

(Date)

Willful false statements on this report are punishable by fine or imprisonment. U. S. Code, Title 18, Section 1001.

Attachment to FCC Form 325
(see instruction 3)

(DO NOT RETURN THIS LISTING TO THE COMMISSION)

ALPHABETICAL RANKINGS OF TOP 100 TV MARKETS - 1965 ARB

Market	Rank	Market Area Commercial TV Stations
Albany-Schenectady-Troy, N.Y.	37	WAST, WRGB, WTEN
Albuquerque, N.M.	100	KGBM-TV, KOAT-TV, KOD-TV
Altoona, Pa. (see Johnstown-Altoona)		
Asheville, N.C. (see Greenville-Spartanburg-Asheville)	16	WAGA-TV, WAIL-TV, WSB-TV
Atlanta, Ga.	96	WBFB, WRDQ-TV
Augusta, Ga.	11	WBAL-TV, WJZ-TV, WHAR-TV
Baltimore, Md.	85	WAFB-TV, WBRZ
Baton Rouge, La.		
Bay City, Mich. (see Saginaw-Bay City-Flint)	82	WBJA-TV, WBNH-TV, WBNP-TV
Birmingham, N.Y.	39	WING, WAP-TV, WBRG-TV
Birmingham, Ala.	5	WBZ-TV, WHDH-TV, WIII-TV, WYAC-TV
Boston, Mass.	22	WHEN-TV, WGR-TV, WKOW-TV
Buffalo, N.Y.	87	KFVS-TV, WPSD-TV, WSIE-TV
Cape Girardeau, Mo.-Paducah, Ky.-Harrisburg, Ill.	74	KCRG-TV, KWWL-TV, WMT-TV
Cedar Rapids-Waterloo, Iowa	73	WCIA, WICS, WAND (formerly WTVF), WCHU
Champaign-Decatur-Springfield, Ill.	45	WCHS-TV, WHIN-TV, WSAZ-TV
Charleston-Huntington, W. Va.	29	WBTV, WCCB-TV, WSOO-TV
Charlotte, N.C.	92	WDEF-TV, WRCB-TV, WTVG
Chattanooga, Tenn.	3	WBDM-TV, WKBK, WCIU, WFLD, WGN-TV, WMAQ-TV
Chicago, Ill.	16	WCPO-TV, WKRC-TV, WLWT, WKYC
Cincinnati, O.	8	WEWS, WJW-TV, WKYC-TV
Cleveland, O.	83	WIS-TV, WHDK-TV, WOLO-TV
Columbia, S.C.	84	WRBL-TV, WTVM
Columbus, Ga.	30	WBNS-TV, WLWC, WTVN-TV
Columbus, O.	15	KRLD-TV, KTVY, WBAP-TV, WFAA-TV
Dallas-Ft. Worth, Tex.		
Dayton, Ohio (see Good City)	38	WHIO-TV, WKEF, WLWD
Dayton, O.		
Daytona Beach, Fla. (see Orlando-Daytona Beach)		
Decatur, Ill. (see Champaign-Decatur-Springfield)		
Denver, Colo.	40	KBTU, KWGN-TV (formerly KCTO) KLZ-TV, KOA-TV
Des Moines, Iowa	76	KRNT-TV, WHO-TV, WOI-TV
Detroit, Mich.	6	CKLW-TV, WJDK-TV, WKBD, WWJ-TV, WXYZ-TV
Durham, N.C. (see Raleigh-Durham)		
Elkhart, Ind. (see South Bend-Elkhart)		
Evansville, Ind.	89	WEHT, WFIE-TV, WTVW
Flint, Mich. (see Saginaw-Bay City-Flint)		
Fort Wayne, Ind.	99	WANE-TV, WKJC-TV, WPTA
Fort Worth, Tex. (see Dallas-Fort Worth)		
Fresno, Cal.	91	KAIL, KFRE-TV, KJED, KMJ-TV
Grand Rapids-Kalamazoo, Mich.	38	WKZO-TV, WOOD-TV, WZZM-TV
Green Bay, Wisc.	64	WBAY-TV, WFRV-TV, WLUK-TV
Greensboro-Winston Salem-High Point, N.C.	49	WFMY-TV, WGHF-TV, WSJS-TV
Greenville-Spartanburg, S.C.-Asheville, N.C.	44	WPRC-TV, WISE-TV, WLOS-TV, WSPA-TV
Hampton, Va. (see Norfolk-Fortsmouth-Newport News-Hampton)	69	WITN-TV, WNEB-TV, WNCT-TV
Harrisburg-Lancaster-Lebanon-York, Pa.	33	WGAL-TV, WHP-TV, WLYH-TV, WSBA-TV, WTPA
Harrisburg, Ill. (see Cape Girardeau-Paducah-Harrisburg)		
Hartford-New Haven, Conn.	13	WHCT, WTIC-TV, WHNB-TV, WHNH-TV
Hawkins, Neb. (see Lincoln-Hastings-Kearney)		
High Point, N.C. (see Greensboro-Winston Salem-High Point)		
Holyoke, Mass. (see Springfield-Holyoke)		
Houston, Tex.	25	KHOU-TV, KPRC-TV, KTRK-TV
Huntington, W. Va. (see Charleston-Huntington)		
Indianapolis, Ind.	38	WFBM-TV, WISH-TV, WLVI, WTTV
Jackson, Miss.	79	WJTV, WLBT
Jacksonville, Fla.	72	WFGA-TV, WJXT
Johnstown-Altoona, Pa.	41	WARD-TV, WFBG-TV, WJAC-TV
Kalamazoo, Mich. (see Grand Rapids-Kalamazoo)		
Kansas City, Mo.	34	KCMO-TV, KMBC-TV, WDAF-TV
Kearney, Neb. (see Lincoln-Hastings-Kearney)		
Knoxville, Tenn.	80	WATE-TV, WBIR-TV, WTVK
Lancaster, Pa. (see Harrisburg-Lancaster-Lebanon-York)		
Lansing, Mich.	47	WLIX-TV, WJIM-TV
Lebanon, Pa. (see Harrisburg-Lancaster-Lebanon-York)		
Lincoln-Hastings-Kearney, Neb.	93	KHAS-TV, KHOL-TV, KOLN-TV
Little Rock, Ark.	71	KARK-TV, KATV, KTHV
Los Angeles, Cal.	2	KABC-TV, KCOP, KHJ-TV, KMEX-TV, KNBC, KNXT, KPOL-TV, KTLA, KTTV

(DO NOT RETURN THIS LISTING TO THE COMMISSION)

Market	Rank	Market Area Commercial TV Stations
Louisville, Ky.	48	WAVE-TV, WHAS-TV, WLKY-TV
Madison, Wis.	81	WISC-TV, WKOW-TV, WMTV
Manchester, N.H.	53	WMUR-TV
Memphis, Tenn.	34	WHBO-TV, WMCY, WREC-TV
Miami, Fla.	20	WCKT, WLBW-TV, WTVJ
Milwaukee, Wis.	23	WISN-TV, WITI-TV, WTMJ-TV, WUHF
Minneapolis-St. Paul, Minn.	17	KNSP-TV, KSTP-TV, WCCO-TV, WTCN-TV
Mobile, Ala.-Pensacola, Fla.	73	WALA-TV, WEAR-TV, WKRG-TV
Moline, Ill. (see Quad City)		
Monterey, Cal. (see Salinas-Monterey-Santa Cruz)		
Nashville, Tenn.	42	WLAC-TV, WSIX-TV, WSM-TV
New Bern, N.C. (see Greenville-Washington-New Bern)		
New Haven, Conn. (see Hartford-New Haven)		
New Orleans, La.	43	WDSU-TV, WYUE, WFL-TV
Newport News, Va. (see Norfolk-Portsmouth-Newport News-Hampton)		
New York, N.Y.	1	WABC-TV, WGBS-TV, WNBC-TV, WNEW-TV, WNJU-TV, WOR-TV, WPIX, WNYC-TV
Norman, Okla. (see Oklahoma City-Ogden-Provo)	35	WAVY-TV, WTAR-TV, WVEC-TV, WYAH-TV
Oakland, Calif.	51	KOCB-TV, KWTX, WKY-TV
Ocala, Fla.	60	KETV, KMTV, WQW-TV
Ocala-Daytona Beach, Fla.	67	WDBO-TV, WESH-TV, WFTV
Ocean City, N.J.		
Ocala-Daytona Beach, Fla.		
Ocala, Ky. (see Cape Girardeau-Podiatz-Harrisburg)		
Ocala, Fla. (see Mobile-Pensacola)		
Ocala, Ill.	98	WEEK-TV, WIRL-TV, WMBD-TV
Philadelphia, Pa.	4	KYW-TV, WCAU-TV, WFIL-TV, WIBF-TV, WKBS, WPHL-TV
Phoenix, Ariz.	62	KOOL-TV, KPHO-TV, KTVK
Pittsburgh, Pa.	9	KDKA-TV, WHIC-TV, WTAE
Portland, Me. (see Portland-Poland Springs)		
Portland, Ore.	36	KATU, KOW-TV, KOIN-TV, KPTV
Portland-Poland Springs, Me.	39	WCHS-TV, WGAN-TV, WHTN-TV
Portsmouth, Va. (see Norfolk-Portsmouth-Newport News-Hampton)		
Providence, R.I.	14	WJAR-TV, WPRO-TV, WTEV
Provo, Utah (see Salt Lake City-Ogden-Provo)		
Quad City (Davenport, Iowa-Rock Island-Moline, Ill.)	66	WHBF-TV, WOC-TV, WOAD-TV
Raleigh-Durham, N.C.	65	WRAL-TV, WTVB
Richmond, Va.	30	WRVA-TV, WTVR, WXEX-TV
Riverside, Cal.	61	WDBJ-TV, WLVA-TV, WLSL-TV
Rochester, N.Y.	68	WHCT-TV, WOKR, WRQC-TV
Roswell, Ill.	94	WCEE-TV, WREX-TV, WTVB
Salt Lake City, Ill. (see Quad City)		
Salt Lake City, Utah	27	KCRV-TV, KOVR, KXTV
Salt Lake City-Flint, Mich.	46	WJRT-TV, WKXN-TV, WNNM-TV
St. Louis, Mo.	12	KMOX-TV, KPLR-TV, KSD-TV, KTVI
St. Paul, Minn. (see Minneapolis-St. Paul)		
St. Petersburg, Fla. (see Tampa-St. Petersburg)		
Salinas-Monterey-Santa Cruz, Cal.	52	KNTV (San Jose), KSBW-TV
Salt Lake City-Ogden-Provo, Utah	43	KCPX-TV, KSL-TV, KUTV
San Antonio, Tex.	37	KENS-TV, KONO-TV, KWEX-TV, WOAI-TV
San Diego, Cal.	34	KFMB, KOGO-TV, KAAR, KXTV, XEWT-TV
San Francisco, Cal.	7	KGO-TV, KPIL, KRON-TV, KTVU
San Jose, Cal. (see Salinas-Monterey-Santa Cruz)		
Schenectady, N.Y. (see Albany-Schenectady-Troy)		
Schenectady, Pa. (see Wilkes-Barre-Scranton)		
Seattle-Tacoma, Wash.	21	KING-TV, KIRO-TV, KOMO-TV, KTNT-TV, KTVW
Seattle, Wash.	69	KSLA-TV, KTLA-TV, KTBS-TV
Seattle, S.D.	90	KELO-TV, KSDO-TV
Seattle-Elkhart, Ind.	97	WNUD-TV, WSBT-TV, WSJV
Seattle, S.C. (see Greenville-Spartanburg-Asheville)		
Spokane, Wash.	77	KHQ-TV, KREM-TV, KXLY-TV
Springfield, Ill. (see Champaign-Decatur-Springfield)		
Springfield-Holyoke, Mass.	78	WHYN-TV, WWLP
Springfield, O. (see Wheeling-Streubenville)		
Springfield, Cal. (see Sacramento-Stockton)		
Springfield, N.Y.	35	WHEN-TV, WHYS-TV, WSYR-TV
Spokane, Wash. (see Seattle-Tacoma)		
Spokane-St. Petersburg, Fla.	32	WFLA-TV, WLCY-TV, WSun-TV, WTVT
Spokane, O.	26	WSPD-TV, WTOL-TV
Spokane, N.Y. (see Albany-Schenectady-Troy)		
Spokane, Calif.	58	KOTY, KTUL-TV, KVQB-TV
Washington, D.C.	10	WMAL-TV, WOOK-TV, WRC-TV, WTOP-TV, WTTG, WDCA-TV
Washington, N.C. (see Greenville-Washington-New Bern)		
Washington, Iowa (see Cedar Rapids-Waterloo)		
Washington, Fla.	85	WEAT-TV, WPTV
Washington-Streubenville, O.	31	WSTV-TV, WTRF-TV
Washington, N.Y.	56	KAKE-TV, KARD-TV, KTVH
Washington-Salem, Pa.	70	WBRE-TV, WDAU-TV, WNEP-TV
Washington-Salem, N.C. (see Greensboro-Winston Salem-High Point)		
Washington, Pa. (see Harrisburg-Lancaster-Lebanon-York)		
Washington, O.	95	WFMJ-TV, WKBN-TV, WYTV

APPENDIX B

TV channel allocation and usage—top 100 markets as of August 31, 1968

ARB rank (NWC)	Market	Commercial										Non-commercial																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																			
		Channels allocated					Stations on the air					Channels not applied for on the air					Stations Authorized					Channels reserved					Stations on the air					Channels applied for					Available																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																										
		V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																								
1	New York (Linden, New Brunswick, Newark, and Paterson, N.J.)	16	13	6	2									1						11	13	11	12																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																																								

TV channel allocation and usage—top 100 markets as of August 31, 1968—continued

ARB rank (NWC)	Market	Commercial										Non-commercial									
		Channels allocated					Stations on the air					Authorized Stations reserved					on the air				
		V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U
78	Des Moines (Ames)	3	4	3	2	2	2	2	2	2	1	2	1	1	1	1	1	1	1	2	
79	Jackson, Miss.	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2		
80	Cape Girardeau, Mo.; Paducah, Ky.; Harrisburg, Ill.	3	2	3	2	3	2	3	2	3	2	3	2	3	2	3	2	3	2	1	
81	Columbus, Ga.	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	1	
82	Youngstown	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	1	
83	Columbia, S.C.	1	3	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	
84	Baton Rouge	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	1	
85	Springfield, Holyoke	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	1	
86	Greenville, Washington, New Bern, N.C.	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	
87	Richmond	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	
88	Madison	1	3	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	
89	Lincoln, Hastings, Kearney (Albion, Grand Island, Superior)	6	3	6	3	6	3	6	3	6	3	6	3	6	3	6	3	6	3	1	
90	Fresno (Hanford, Visalia)	3	6	3	5	3	5	3	5	3	5	3	5	3	5	3	5	3	5	1	
91	Chattanooga	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	3	1	
92	Evansville	1	3	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	
93	Sioux Falls	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	1	
94	South Bend, Elkhart	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	1	
95	West Palm Beach	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	1	
96	Ft. Wayne	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	1	
97	Rockford, Ill. (Freeport)	1	3	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	2	1	
98	Peoria, Ill.	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	1	
99	Augusta	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	1	
100	Terre Haute	2	1	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	2	1	
Subtotal—Top 30 markets		157	163	157	153	157	153	157	153	157	153	157	153	157	153	157	153	157	153	32	
Subtotal—51 through 100		107	134	107	41	107	41	107	41	107	41	107	41	107	41	107	41	107	41	37	
Total 100 markets		264	297	264	94	264	94	264	94	264	94	264	94	264	94	264	94	264	94	69	

1 Channels 13 and 31—Commercial channels used by ETV.

2 Channel 12—Commercial channel used by ETV.

3 Channel 23—Commercial channel used by ETV.

4 Channel 17—Commercial channel used by ETV.

5 WFLX—Channel 19 shares time with WWSB-ETV station.

6 Channel 25—Commercial channel used by ETV.

APPENDIX C

Part 74, subpart K, is amended as follows:

1. In section 74.1101, paragraph (l) is amended and paragraphs (j), (k), (l), (m), (n), and (o) are added as follows:

§ 74.1101 Definitions.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the predicted grade B contour of that station.

(j) *Major television market.* The term "major television market" means a television market listed in § 74.1107(a) of this chapter.

(k) *Designated community in a major television market.* The term "designated community in a major television market" means a community named in the list of major television markets in § 74.1107(a) of this chapter.

(l) *Smaller television market.* The term "smaller television market" means a television market which is not listed in § 74.1107(a) of this chapter.

(m) *Specified zone of television broadcast stations.* The term "specified zone of a television broadcast station" means the area extending 35-air miles from the main post office in the community or communities to which that station is assigned by the *Table of Assignments* contained in § 73.606 of this chapter.

(n) *Full network station.* The term "full network station" means a television broadcast station which is owned by a national television network or which has a primary affiliation contract with a single such network and no secondary affiliation with any other network.

(o) *Partial network station.* The term "partial network station" means a television broadcast station which is affiliated with more than one national television network or which has a secondary affiliation contract with a single such network.

2. In section 74.1103, new subparagraphs (b) (5) and (d) (4) are added to read as follows:

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

(b) *Exceptions.* . . .

(5) No system shall carry the signal of any station if the carriage of such signal would be inconsistent with § 74.1107(c) of this chapter.

(d) *Manner of carriage.* . . .

(4) The signal shall be carried in full, without deletion or alteration of any portion except as required by paragraph (f) of this section.

3. Section 74.1107 is revised to read as follows:

§ 74.1107 Requirements applicable to carriage of television broadcast signals in specified zones and in areas outside of specified zones.

(a) The major television markets and their designated communities are:

- (1) New York, N.Y.
- (2) Los Angeles, Calif.
- (3) Chicago, Ill.
- (4) Philadelphia, Pa.
- (5) Boston, Mass.
- (6) Detroit, Mich.
- (7) San Francisco, Calif.
- (8) Cleveland, Ohio
- (9) Washington, D.C.
- (10) Pittsburgh, Pa.
- (11) Baltimore, Md.
- (12) St. Louis, Mo.
- (13) Hartford, New Haven, Conn.
- (14) Providence, R.I.; New Bedford, Mass.

Federal Communications Commission Reports

- (15) Dallas, Fort Worth, Tex.
- (16) Cincinnati, Ohio
- (17) Minneapolis, St. Paul, Minn.
- (18) Indianapolis, Ind.
- (19) Atlanta, Ga.
- (20) Miami, Fla.
- (21) Buffalo, N.Y.
- (22) Seattle, Tacoma, Wash.
- (23) Kansas City, Mo.
- (24) Milwaukee, Wis.
- (25) Sacramento, Stockton, Calif.
- (26) Houston, Galveston, Tex.
- (27) Dayton, Ohio
- (28) Columbus, Ohio
- (29) Johnstown, Altoona, Pa.
- (30) Harrisburg, Lancaster, Lebanon, York, Pa.
- (31) Tampa, St. Petersburg, Fla.
- (32) Memphis, Tenn.
- (33) Charlotte, N.C.
- (34) Syracuse, N.Y.
- (35) Toledo, Ohio
- (36) Portland, Oreg.
- (37) Wheeling, W. Va. ; Steubenville, Ohio
- (38) Grand Rapids, Kalamazoo, Mich.
- (39) Denver, Colo.
- (40) Birmingham, Ala.
- (41) Nashville, Tenn.
- (42) Albany, Schenectady, Troy, N.Y.
- (43) New Orleans, La.
- (44) Greenville, Spartanburg, S.C. ; Asheville, N.C.
- (45) Greensboro, Winston-Salem, High Point, N.C.
- (46) Flint, Saginaw, Bay City, Mich.
- (47) Louisville, Ky.
- (48) Charleston, Huntington, W. Va.
- (49) Lansing, Mich.
- (50) San Diego, Calif.
- (51) Oklahoma City, Okla.
- (52) Raleigh, Durham, N.C.
- (53) Norfolk, Portsmouth, Newport News, Hampton, Va.
- (54) Manchester, N.H.
- (55) Omaha, Nebr.
- (56) Wichita, Hutchinson, Kans.
- (57) San Antonio, Tex.
- (58) Tulsa, Okla.
- (59) Salt Lake City, Ogden, Provo, Utah
- (60) Salinas, Monterey, Calif.
- (61) Phoenix, Ariz.
- (62) Davenport, Iowa ; Rock Island, Moline, Ill.
- (63) Portland, Poland Spring, Maine
- (64) Rochester, N.Y.
- (65) Orlando, Daytona Beach, Fla.
- (66) Richmond, Petersburg, Va.
- (67) Roanoke, Lynchburg, Va.
- (68) Shreveport, La. ; Texarkana, Tex.
- (69) Wilkes-Barre, Scranton, Pa.
- (70) Green Bay, Wis.
- (71) Little Rock, Ark.
- (72) Champaign, Decatur, Springfield, Ill.
- (73) Mobile, Ala. ; Pensacola, Fla.
- (74) Cedar Rapids, Waterloo, Iowa
- (75) Jacksonville, Fla.
- (76) Spokane, Wash.
- (77) Knoxville, Tenn.

- (78) Des Moines, Fort Dodge, Iowa
- (79) Jackson, Miss.
- (80) Cape Girardeau, Mo.; Paducah, Ky.; Harrisburg, Ill.
- (81) Columbus, Ga.
- (82) Youngstown, Ohio
- (83) Columbia, S.C.
- (84) Baton Rouge, La.
- (85) Springfield, Holyoke, Mass.
- (86) Greenville, Washington, New Bern, N.C.
- (87) Binghamton, N.Y.
- (88) Madison, Wis.
- (89) Lincoln, Hastings, Kearney, Nebr.
- (90) Fresno, Calif.
- (91) Chattanooga, Tenn.
- (92) Evansville, Ind.
- (93) Sioux Falls, S. Dak.
- (94) South Bend, Elkhart, Ind.
- (95) West Palm Beach, Fla.
- (96) Fort Wayne, Ind.
- (97) Rockford, Ill.
- (98) Peoria, Ill.
- (99) Augusta, Ga.
- (100) Terre Haute, Ind.

(b) *Carriage of distant signals in major television markets.*—No CATV system operating in a community located in whole or in part, within the specified zone of a television broadcast station assigned to a designated community in a major television market shall extend the signal of a commercial television broadcast station beyond the predicted grade B contour of the station, unless such station has expressly authorized the system to retransmit the program or programs on the signal to be extended: *Provided, however,* That the system may carry the signal of any noncommercial educational station, in the absence of timely objection filed pursuant to section 74.1109 of this chapter by any local educational station or by any local or State educational television agencies: *Provided, further,* That priority of carriage is afforded to the signals of educational stations located in the same State or closest to the system.

(c) *Carriage of signals from a major television market in another major market.*—No CATV system operating in a community located wholly within the specified zone of a television broadcast station assigned to a designated community in a major television market shall carry the signal of a commercial television broadcast station assigned to a designated community in another major television market, unless the community of the CATV system is also located wholly within the specified zone of the station in the other major market or unless the system has the express authorization of the originating station to retransmit the program or programs on the signal to be extended: *Provided, however,* That the system may carry the signal of any noncommercial educational station assigned to such other major market, in the absence of timely objection filed pursuant to section 74.1109 of this chapter by any local market educational station or by any local or State educational television agencies.

(d) *Carriage of distant signals in smaller television markets.*—(1) No CATV system operating in a community located in whole or in part, within the specified zone of a television broadcast station assigned to a smaller television market shall extend the signal of a television broadcast station beyond the predicted grade B contour of such station, except as authorized in subparagraphs (2), (3), and (4) of this paragraph: *Provided, however,* That such a system may carry additional distant signals if the system has the express authorization of the originating station to retransmit the program or programs on any additional signals to be extended.

(2) The system may carry such distant signals as may be necessary to furnish to its subscribers the signals of a full network station of each of the national television networks counting any full network stations carried on the system pursuant to section 74.1103(a) of this chapter, provided that

the distant signals are obtained from the closest full network station in the region or in the State of the system and do not include more than one full network station of the same network.

(3) The system may carry the distant signal of one independent station obtained from the nearest community with an operating independent station or stations. In the event that such community has more than one operating independent station, the system shall select the signal of whichever independent station it chooses to carry. The system may also carry the distant signal of any independent station that may subsequently commence operation at a location closer to the community of the system.

(4) The system may carry the signal of any noncommercial educational television station, in the absence of timely objection filed pursuant to section 74.1109 of this chapter by any local educational station or by any local or State educational television agencies, provided that priority of carriage is afforded to the signals of educational stations located in the same State or closest to the system.

(c) *Carriage of distant signals in areas outside any specified zone.*—
(1) No CATV system operating outside the specified zones of all television broadcast stations shall extend the signal of any television broadcast station beyond the station's predicted grade B contour unless the system is carrying the signals of all television broadcast stations in the same class that are operating in communities located closer to the system. The classes of television broadcast stations to which this subparagraph is applicable are the following:

- (i) Stations that are full network stations of the same network.
- (ii) Stations that are partial network stations of the same network or networks.
- (iii) Independent stations.
- (iv) Noncommercial educational stations.

(2) The Commission may waive the provisions of subparagraph (1) of this paragraph for good cause shown in a petition filed pursuant to section 74.1109 of this chapter, such as a showing that (i) the community of the more distant station is located in the same State or (ii) the system's subscribers have a greater community of interest with the region served by the more distant station.

(f) *Applicability of this section.*—The provisions of this section do not apply to day signals which a CATV was supplying to subscribers in its community on December 20, 1968 (or pursuant to prior Commission authorization, whenever given), or to carriage of the same signals by any other CATV system that subsequently commences operation in the same community, unless it is proposed to extend lines into another community. Where a CATV system is limited by order of the Commission to carrying signals governed by this section only in particular geographic areas of a community, the provisions of this section shall apply to carriage of such signals by any CATV system in all other areas of that community.

4. In section 74.1109, a new note is added as follows:
- § 74.1109 Procedures applicable to petitions for waiver of the rules, additional, or different requirements and rulings on complaints or disputes.

NOTE.—It is not contemplated that the provisions of section 74.1107 (b), (c), and (d) of this chapter, relating to carriage of television broadcast signals in specified zones, will be waived.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent.

The *Notice of Proposed Rulemaking and Notice of Inquiry* adopted this day by the Commission majority is a complex document divided into five parts:

- I. Nature and scope of proceeding.
- II. Background.

III. Proposed CATV rules on required program origination, advertising, equal time, spot or identification, fairness, doctrine, ownership, common carrier leasing of channels, reporting requirements, and technical standards.

IV. Proposed rules on CATV importation of signals in a 35-mile zone of TV stations and retransmission permission of stations in the top 100 markets, plus Interim Procedures.

V. General areas of inquiry on CATV's role in the national communications structure.

The Interim Procedures of part IV are crucial because they immediately apply new rules which will obtain during the pendency of the proceeding. I believe that such application now of the new "interim" rules is fatally defective because the rules are substantive and are applied without rulemaking as required by the Administrative Procedure Act. The Commission majority makes no showing, as required by section 4 of the APA, that the "situation [is one] in which an agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and the procedure thereon are impracticable, unnecessary, or contrary to the public interest."

It appears to me that the interim procedures will either compound the administrative quagmire the Commission got itself into with the *Second Report and Order* or they will completely stifle further development of CATV. I am satisfied that the latter is a distinct possibility since only the most daring will be willing to gamble additionally on the outcome of the proposals in part III without some prospect of grandfathering protection which the *Notice* explicitly precludes.

The basic new rule is a revision of section 74.1107 and provides, among other things, that no CATV system within a 35-mile zone of a station can carry distant signals unless (a) in the top 100 markets, it has retransmission permission of the TV station, and (b) in markets in the top 100, it uses the nearest distant signals necessary to fill its complement of three networks, one independent and one educational (no retransmission permission is required).

I disagree with the new rule which imposes on CATVs the concept of section 325(a) of the Communications Act of requiring express authority from the originating station to retransmit its programming—Congress has, to date, refused to impose. The requirement has the effect of copyright clearance. The Supreme Court ruled in the *nightly* case that carriage of a television station's programming is a performance under the Copyright Act and CATVs are not subject to the act. Thus, CATVs do not now need to secure copyright clearance from TV stations, as they may be required to, in effect, under the new rule here put into force.

The Interim Procedures, are, I believe, contrary to the public interest because they deny to the people of the United States a communications service for which they have shown a demand in the market.

I have long urged the Commission to hold public hearings on CATV to determine what role it can best play in communications service to the public and, upon such determination, issue notices of proposed rulemaking to implement the conclusions. I believe that the present proceeding puts the cart before the horse in proposing rules.

without first determining what CATV's overall role is to be and in prejudging the role by proposals which are presently unsupported.

STATEMENT OF COMMISSIONERS KENNETH A. COX AND ROBERT E. LEE
CONCURRING IN PART AND DISSENTING IN PART

We agree with the main thrust of the action taken here. Some change in our approach to CATV matters is clearly necessary in order to permit the orderly integration of cable service into our basic over-the-air television service without undue disruption of the latter. We agree that the shift in emphasis involved in the retransmission concept is a sound one.

However, we believe that the reduction in the area to be preserved against unfair competition is too extreme. The radius of the grade A coverage of a full powered VHF station is commonly 60 miles or more. Cutting back from the grade A standard of the *Second Report and Order* to the proposed zone with a radius of 35 miles reduces the area of concern by almost exactly two-thirds. While in many markets the bulk of the audience may be within this smaller zone, in other cases a significant percentage of the market's net weekly circulation will be outside that area. We would have preferred to use the predicted grade A contour, or something approximating it, to the 35-mile standard here proposed.

Furthermore, while we think this proposal deals with the problems of the smaller markets more realistically than did the *Second Report and Order*, we are not satisfied that it adequately protects small market stations from harmful fragmentation of their audiences.

Although there are other matters of detail about which we have some question, we believe that the proposal in its entirety is generally sound and represents a most constructive step forward.

SUPREME COURT OF THE UNITED STATES

No. 71-506

UNITED STATES, ET AL., PETITIONERS

v.

MIDWEST VIDEO CORPORATION

ORDER ALLOWING CERTIORARI—Filed January 10, 1972

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

LIBRARY
SUPREME COURT FILE 506

OCT 8 1971

E. ROBERT DEVER, CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

MIDWEST VIDEO CORPORATION

PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HERVIN W. GARDNER

Assistant Attorney General

RICHARD W. GARDNER

Assistant Attorney General

RICHARD B. STONE

Assistant to the Solicitor General

Department of Justice

Washington, D.C. 20530

RICHARD B. WILSON

General Counsel

JOHN H. COULSON

Assistant General Counsel

EDWARD J. KULLBACK

Attorney

Federal Communications Commission

Washington, D.C. 20541

INDEX

Opinions below.....	Page 1
Jurisdiction.....	2
Question presented.....	2
Statutes and regulation involved.....	2
Statement.....	2
Reasons for granting the writ.....	6
Conclusion.....	13
Appendix A.....	15
Appendix B.....	30
Appendix C.....	31
Appendix D.....	57
Appendix E.....	65
Appendix F.....	68

CITATIONS

Cases:

<i>American Trucking Assns v. United States</i> , 344 U.S. 298.....	8
<i>Carter Mountain Transmission Corp. v. Federal Communications Commission</i> , 361 F. 2d 359, certiorari denied, 375 U.S. 951.....	10
<i>Federal Communications Commission v. Pottsville Broadcasting Co.</i> , 309 U.S. 134.....	7
<i>Federal Power Commission v. Transcontinental Gas Pipe Line Corp.</i> , 365 U.S. 1.....	10
<i>Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.</i> , 289 U.S. 266.....	10
<i>General Telephone Co. of California v. Federal Communications Commission</i> , 413 F. 2d 390, certiorari denied, 396 U.S. 888.....	10, 12
<i>Midwest Television, Inc.</i> , 13 F.C.C. 2d 478, affirmed, <i>Midwest Television, Inc., et al v. F.C.C.</i> , 402 F. 2d 1222 (CA 9c).....	4, 5

National Broadcasting Co. v. United States, 319 U.S. 190 _____ Page 7, 12

United States v. Southwestern Cable Co., 392 U.S. 157- 2, 6, 8, 9

United States v. Storer Broadcasting Co., 351 U.S. 192- 7

Statutes and regulations:

Communications Act of 1934, 48 Stat. 1084, as amended, 47 U.S. 151 *et seq.*:

Sec. 1 _____ 2, 7, 68

Sec. 2 _____ 2, 7, 68

Sec. 3 _____ 2, 69

Sec. 4 _____ 2, 7, 70

Sec. 301 _____ 2, 70

Sec. 303 _____ 2, 5, 8, 71

Sec. 307 _____ 2, 5, 72

Sec. 315 _____ 4

Sec. 317 _____ 4

Miscellaneous:

Addenda to Television Factbook, Vol. 11: 40, Oct. 4, 1971 _____ 12

117 Con. Rec. S. 13628 (daily ed. August 6, 1971, 31 F.C.C. 2d 115 _____ 13

33 Fed. Reg. 19028 _____ 3

Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C. 2d 417 _____ 3

Television Factbook, 1971-1972, Service Vol., p. 81a- _____ 12

In the Supreme Court of the United States

OCTOBER TERM, 1971

No.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

MIDWEST VIDEO CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The United States and the Commission believe that this case presents an important issue which ought to be resolved now by this Court. The United States has not, however, finally determined its position with respect to all aspects of the merits of the case. The views with respect to the merits expressed in this petition are those of the Commission.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra* pp. 15-29) is reported at 441 F. 2d 1322. The orders

of the Federal Communications Commission are reported at 20 F.C.C. 2d 201, 23 F.C.C. 2d 825, and 27 F.C.C. 2d 778 (Apps. C, D, and E, *infra*, pp. 31-67).

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1971 (App. B, *infra*, p. 30). By order of Mr. Justice Blackmun the time within which to petition for certiorari was extended to October 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission's rule requiring community antenna television systems with 3500 or more subscribers to originate programming is within the Commission's statutory authority.

STATUTE AND REGULATION INVOLVED

Sections 1, 2(a), 3(a), 3(b), 3(d), 4(i), 301, 303(g), 303(r), 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, 152(a), 153(a), 153(b), 153(d), 154(i), 301, 303(g), 303(r), 307(b), are set forth in Appendix F, *infra*, pp. 68-72. The rule under review is also set forth in Appendix F, *infra*, p. 73.

STATEMENT

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, this Court held that community antenna television (CATV) systems engage in "interstate * * * communication by wire or radio" within the meaning of Section 2(a) of the Communications Act of 1934,

47 U.S.C. 152(a), and, consequently, that the Federal Communications Commission has regulatory jurisdiction over CATV, at least insofar as its regulation is "reasonably ancillary" to its regulation of the broadcast industry. Shortly thereafter the Commission launched a general inquiry "to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology and potential services * * *." *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C. 2d 415; 33 Fed. Reg. 19028. In particular, the Commission requested comments on whether it should require CATV systems to originate programming, and, in addition, on whether advertising should be permitted and whether the concepts of "equal time", "fairness" and sponsorship identification, applicable to the broadcasting industry, ought to apply to CATV.

On October 24, 1969, the Commission issued a report, 20 F.C.C. 2d 201; App. C, *infra*, pp. 31-56, dealing with the subject of program origination, or "cablecasting", by CATV systems. In this report, the Commission adopted a rule which provided that a CATV system having 3,500 or more subscribers² may not

¹ Other areas of inquiry included cross-ownership of television stations and CATV systems under common control, the use of some CATV channels to provide common carrier service, and importation of distant signals into major markets.

² In setting 3,500 subscribers as a feasible minimum size for systems required to originate programs, the Commission took into account record evidence on the estimated cost of con-

distribute the signals of television broadcast stations unless it also operates "to a significant extent as a local outlet by cablecasting" and by having available "facilities for local production and presentation of programs other than automated services" (App. C, *infra*, pp. 16-17).³ The Commission had observed in its Notice of Rulemaking that the CATV industry was placing increased emphasis on program origination, including both local public service and entertainment programs, and on providing other nonbroadcast services to the public such as time, weather, and news reports and advertising.⁴ On the basis of the comments submitted in

structing and operating cablecasting systems of varying degrees of sophistication and the statistics of the industry which showed that 70% of the cablecasting systems currently originating programs had less than 3,500 subscribers and more than 50% of the originating systems had less than 2,000 subscribers. 20 F.C.C. 2d 201, 209-214 (App. C, *infra*, pp. 39-44).

³ In addition, the Commission adopted rules which limit advertising messages to the beginning and end of each cablecast program and to natural breaks or intermissions within the program. Also regulations similar to those which the Communications Act and Commission rules make applicable to broadcasters were adopted with respect to cablecasts by candidates for public office, programs dealing with controversial issues of public importance and sponsorship identification of matter the system had been paid to cablecast (cf. 47 U.S.C. 315, 317).

⁴ The Commission also referred to its earlier consideration of the subject in a recently completed CATV hearing involving the San Diego area. *Midwest Television, Inc.*, 13 F.C.C. 2d 478, affirmed, *Midwest Television, Inc. v. F.C.C.*, 426 F. 2d 1222 (C.A.D.C.). In *Midwest* the Commission authorized a test of unrestricted program origination without commercials by CATV systems in the San Diego area, and conditioned the carriage "of broadcast signals by one system upon a requirement that it operates to a significant extent as an outlet for non-

the rule making proceeding the Commission concluded that CATV program origination serves the public interest by providing program diversity and creating outlets for self-expression, particularly in those areas where the establishment of broadcast stations has not proven feasible (20 F.C.C. 2d at 205-206, App. C, *infra*, pp. 35-36), and that the most effective way to encourage cablecasting would be to condition "where practicable, the carriage of broadcast signals upon a requirement for program origination" (*id.* at 208, App. C, *infra*, p. 38).⁵

Upon the challenge of respondent, an operator of CATV systems in Missouri, New Mexico, and Texas, the court of appeals set aside the program origination requirement on the ground that the Commission did not have the statutory authority to adopt it. Citing

commercial community self-expression." 13 F.C.C. 2d at 510. The decision discussed at some length (*id.* at 503-508) the benefits to be gained from program origination, in particular the increase it would provide in the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service.

"The use of broadcast signals," the Commission stated, "has enabled CATV to finance the construction of high capacity cable facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to 'encourage the larger and more effective use of radio in the public interest' (47 U.S.C. 303(g)). The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities (47 U.S.C. 307(b)), in areas where we have been unable to accomplish this through broadcast media." 20 F.C.C. at 208, App. C, *infra*, pp. 38-39.

Southwestern, supra, the court held that the cablecasting requirement was not "ancillary" to the Commission's responsibilities in the broadcast field and that therefore program origination by CATVs was beyond the scope of its jurisdiction. The court rejected the Commission's contention that the Communications Act was intended to confer unified jurisdiction and broad authority over all of the nation's wire and radio communication systems. Judge Gibson concurred in the result, concluding that the Commission has the necessary authority over CATV to adopt the rule in question but that while the rule "is in the public interest, it does not appear that the FCC has shown a sufficient basis for exercising its authority at this time" (App. A, *infra*, p. 26-29).

REASONS FOR GRANTING THE WRIT

The Federal Communications Commission contends that the decision below is contrary to the underlying rationale of the Federal Communications Act of 1934, and is inconsistent with this Court's view of that Act as expressed in *United States v. Southwestern Cable Co.*, 392 U.S. 157. If allowed to stand, the Commission believes that the decision will frustrate the Commission's efforts to integrate fully the rapidly expanding CATV industry into the nationwide communications system.

* The court did not pass on the other rules relating to program origination (n. 3, *supra*), stating that since the petitioner could not be compelled to telecast, it lacked standing to challenge them.

1. Congress created the Federal Communications Commission in 1934 for the purpose of "centralizing authority heretofore granted by law to several agencies and * * * granting additional authority" in order to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities * * *." Section 1, 47 U.S.C. 151. The Commission's authority extends to "all interstate and foreign communication by wire or radio" and "to all persons engaged within the United States in such communication." Section 2(a), 47 U.S.C. 152(a).

The scheme of regulation created by the Act is not, as the decision below implies, restricted to forms of wire and radio communication in use at the time the Act was passed; rather, the Act was also designed to meet new developments in the continuously evolving uses of wire and radio. With respect to both technological and economic regulation the Commission is given comprehensive powers "to promote and realize the vast potentialities of radio." *National Broadcasting Co. v. United States*, 319 U.S. 190, 217; see *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. Thus, with respect to the Commission's rule making powers, Section 4(i), 47 U.S.C. 154(i), contains a broad grant of authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the

execution of its functions." These rulemaking powers are "coterminous with the scope of agency regulation * * *." *American Trucking Assns v. United States*, 344 U.S. 298, 311; see *id.* at 309-311.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, this Court indicated that the Communications Act confers on the Commission essentially the same jurisdiction over CATV that it has over the broadcasting industry. Rejecting the contention that the Act "limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions," 392 U.S. at 172, the Court emphasized Congress' intention that all branches of the wire or radio communications industry be subject to a unified regulatory system:

We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio * * *." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical com-

⁷ Section 303(r), 47 U.S.C. 303(r), similarly grants authority "[e]xcept as otherwise provided in this Act * * * from time to time, as public convenience, interest, or necessity requires * * *" to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *."

munication * * *." S. Rep. No. 781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F.C.C. v. Pottsville Broadcasting Co.*, *supra*, at 138, that it conferred upon the Commission a "unified jurisdiction"⁸ and "broad authority."⁹ Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors * * *." [392 U.S. at 172-173; footnotes renumbered.]

To be sure, the Court's opinion also noted that the Court was not required in *Southwestern* to decide the full scope of the Commission's regulatory jurisdiction over CATV, but merely whether the Commission had jurisdiction to regulate CATV in ways which are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. Relying upon this cautionary language, the court of appeals seems to have concluded that the Commission's regulations in the CATV area must be designed only to prevent harmful competitive effects on the broadcast industry. Such a narrow reading of *Southwest-*

⁸ "S. Rep. No. 781, *supra*, at 1" (footnote by the Court).

⁹ "H.R. Rep. No. 1850, *supra*, at 1" (footnote by the Court).

ern is unjustified. In the portion of its opinion quoted above, this Court strongly suggested that the Commission's regulatory jurisdiction over CATV is similar to its jurisdiction over other major segments of the communications industry.

In any event, even if Commission regulation of CATV must be "reasonably ancillary" to regulation of broadcasting, there is no reason to believe that this standard would restrict the Commission to regulation designed to prevent deleterious competition to the broadcasting industry. The CATV industry is dependent for its existence upon the broadcast signals that it picks up and transmits. Having become "an integral part of interstate broadcast transmission," CATV operators "cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission." *General Telephone Co. of California v. Federal Communications Commission*, 413 F. 2d 390, 401 (C.A.D.C.) (per Burger, J.), certiorari denied, 396 U.S. 888; see also *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266; *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.* 365 U.S. 1, 7; *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951. Thus, even if there must be some connection between the Commission's regulation of CATV and its responsibilities in the broadcasting area, such a connection is present, when, as here, the Commission attempts to require CATV operators, whose principal product

is the retransmission of broadcast signals and who serve the same functions in many areas as broadcasters, to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters.

Indeed, though the court below referred to the "reasonably ancillary" language of the *Southwestern* case, most of the majority opinion deals with the court's view of the wisdom of the program origination requirement, which it considered economically burdensome to cablecasters.¹⁰ This factor, of course, bears not upon the Commission's jurisdiction, but upon the reasonableness of the regulation. The Commission does not contend that its authority to regulate CATV is exempt from the requirement of reasonableness, and it recognizes that the question of the reasonableness of regulation in the CATV area might in some situations depend upon factors different from those present in the regulation of the broadcasting industry. We submit, however, that the restriction by the court below of the Commission's *jurisdiction* to regulate the

¹⁰ The record before the Commission, however, does not support this conclusion. In considering the financial impairment contentions of the parties, the Commission noted that the record contained "no data tending to demonstrate that systems with 3,500 subscribers cannot cablecast without impairing their financial stability * * *." The Commission pointed out that 70% of the systems already originating programs had fewer than 3,500 subscribers. Moreover, the court failed to consider either the available data on costs before the Commission or the fact that the cablecasting requirement is very flexible (23 F.C.C. 2d at 826-827) and includes specific guidelines for waiver of the requirement if cablecasting would in fact be financially injurious to a system. 27 F.C.C. 778, 779-780.

operation of CATV systems is contrary to Congress' intention, recognized by this Court, to establish a unified system of regulation of the "radio and wire" communications industry. Indeed, lack of Commission jurisdiction in this field would presumably open the door to disparate state and local regulation of CATV services in contravention of the objectives of uniform and integrated regulation which Congress sought to achieve. Cf. *General Telephone Co. of California v. Federal Communications Commission*, *supra*, 413 F.2d at 402.

2. There are now more than 2,500 CATV systems in operation (*Television Factbook*, 1971-1972, Services Volume, p. 18a) servicing an estimated 15 to 20 million viewers per day. In addition there are more than 2,000 CATV franchises outstanding which are not currently operating, and approximately 2,600 franchise applications pending. *Addenda to Television Factbook*, Vol. 11-40, October 4, 1971. While the growth of CATV is still accelerating, its enormous potential as a communication service to the public is now in clear enough focus to underscore the need for unified regulation which will integrate CATV into the existing nation-wide communication service. The alternative to Commission regulation is the kind of fragmented regulatory pattern and chaotic development which characterized broadcasting in its early years and which led to the enactment of the Communications Act of 1934. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 211-214. Although CATV itself had not yet been developed and was not specifically considered

by Congress at that time, it was the purpose of the Communications Act to confer sufficient authority on the Commission to prevent this kind of chaos from occurring again in the communications field:

Indeed, the cablecasting rule is part of a comprehensive regulatory program which the Commission is developing to integrate cable television into the nation's communications system. Under active consideration, though not yet adopted in the form of rules, are a number of related proposals which seek to utilize the high capacity cable facilities of CATV to provide a diversity of public services beyond that provided by the retransmission of broadcast signals, such as two-way non-voice communication, leased channels, public access channels, educational channels, and others.¹¹ The restrictive view of the Commission's jurisdiction reflected in the decision below casts serious doubt on this entire program. The case thus presents a question of great importance to the administration of the Communications Act and to the future development of the communications industry.

CONCLUSION

While, as previously noted (*supra*, p. 1), the views on the merits expressed herein are those of the Commission, both the United States and the Commission

¹¹ A full statement of the Commission's "proposals for the near-term regulation of cable television" was submitted on August 5, 1971, to appropriate committees of the House and Senate and appears at 117 Cong. Rec. S. 13628 (daily ed. August 6, 1971) and 31 F.C.C. 2d 115.

join in urging that the case is an important one, which should be reviewed by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. McLAREN,
Assistant Attorney General.

RICHARD B. STONE,
Assistant to the Solicitor General.

RICHARD E. WILEY,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

EDWARD J. KUHLMANN,
Attorney,
Federal Communications Commission.

OCTOBER 1971.

APPENDIX A

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

No. 20,439.

Midwest Video Corporation,
Petitioner,

v.

United States of America and Fed-
eral Communications Commis-
sion,

Respondents.

On Petition for Re-
view of Orders of
the Federal Com-
munications Com-
mission.

[May 13, 1971.]

Before VAN OOSTERHOUT, GIBSON and LAY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Petitioner, Midwest Video Corporation, seeks review of the first report and order adopted by the Federal Communications Commission (FCC) on October 24, 1969, reported at 20 F.C.C. 2d 201, and its order denying reconsideration adopted June 24, 1970, reported at 23 F.C.C. 2d 825. The foundation for such orders was laid by notice of proposed rule making and notice of inquiry reported at

15 F.C.C. 2d 417 relating to community antenna television systems (CATV).

Petitioner operates CATV systems in Missouri, New Mexico and Texas. Some of its systems have microwave authorization and some systems have more than 3500 subscribers. Petitioner was substantially engaged in its CATV operations long prior to the institution of the rule making proceedings here involved.

The FCC, asserting authority to do so pursuant to the Communications Act of 1934 as amended, 47 U.S.C.A. § 151 et seq., adopted: (1) Rules requiring all CATV systems with 3500 or more subscribers to produce original programs to a significant extent and to have available facilities for the production of such programs after April 1, 1971, as a condition to its right to continue to function as a CATV system. (2) Rules limiting type of programs which CATV systems may transmit upon the basis of a program of per channel charge. (3) Rules governing the program origination of all CATV systems.

Petitioner contends that Congress has not by the Communications Act or otherwise authorized the FCC to prescribe such rules. We agree with the petitioner's contention and set aside the origination rule for the reasons hereinafter stated.

The principal attack is upon the origination rule referred to at item (1) above. Section 74.1111 of the Commission's rules so far as here material reads:

"(a). Effective on and after April 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities

for local production and presentation of programs other than automated services. . . ."

Cable casting is thus defined in § 74.1101:

"(j) *Cablecasting*. The term 'cablecasting' means programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system."

No direct authority is granted to the FCC by the Communications Act to regulate CATV systems. CATV came into existence subsequent to the enactment of the Communications Act of 1934. Consequently it is not surprising that nothing can be found in the Act or its legislative history bearing upon the intention of Congress with respect to CATV regulation. Many efforts to enact legislation covering CATV have failed to meet with success. The growth of CATV has been explosive. Courts have found the issue of the right of the FCC to regulate CATV to be extremely troublesome. The concern is not over the power of Congress to regulate CATV but over the authorization Congress has actually made.

Descriptions of CATV systems covering both off-the-air and microwave fed types, the function of CATV and the pertinent history of its development are fully discussed in the FCC reports and in *United States v. Southwestern Cable Co.*, 392 U.S. 157, and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390. See *Black Hills Video Corp. v. F.C.C.*, 8 Cir., 399 F.2d 65. No need exists to re-cover this ground here.

CATV operations are of two types, off-the-air and microwave. Off-the-air systems capture television and radio signals off the air by means of a high antenna con-

vert or modify the signal by electronic equipment and carry the converted signal to subscribers for a fee by coaxial cable and wire. Microwave systems use amplifying devices to bring distant signals over the air to the receiving end of its station from which it conveys the signal to customers in the same manner as off-the-air systems. The FCC first asserted jurisdiction over microwave fed systems and later asserted jurisdiction over off-the-air systems. The courts appear to attach no significance to the distinctions between off-the-air microwave fed systems. See *Southwestern Cable Co.*, supra, p. 167 of 392 U.S.

In any event, the authority of the FCC in our present case does not appear to turn on the competing use of the spectrum by microwave fed operations. The rules are applied in the same manner to both off-the-air and the microwave operations.

In *Southwestern Cable Co.*, the Supreme Court upheld the right of the FCC to require CATV systems to carry signals of local television stations, the nonduplication of local programing and the restriction of CATV transmission of distant signals into the one-hundred largest television markets (except for such services as existed on February 15, 1966).

Such authority was predicated upon 47 U.S.C.A. § 152 (a) making the provisions of the Act applicable to "inter-state or foreign communication by wire or radio" and the broad statements of purposes in 47 U.S.C.A. § 151 directing the FCC to "make available . . . to all the people of the United States a rapid, efficient, Nationwide wire and radio communication service. . . ." Reliance is also placed on § 153(a) and (b) defining wire and radio communications, and §§ 307(b) and 303(f) relating to providing equitable allocations of broadcasting facilities.

The Court in *Southwestern Cable* by way of limitation states:

“There is no need here to determine in detail the limits of the Commission’s authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue ‘such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,’ as ‘public convenience, interest, or necessity requires.’ 47 U.S.C. §303(r). We express no views as to the Commission’s authority, if any, to regulate CATV under any other circumstances or for any other purposes.” 392 U.S. 157, 178.

The compulsory origination rule here goes far beyond the regulatory power approved in *Southwestern Cable Co.* The traditional CATV operation differs greatly from that of originating programs. For origination, substantial investment in entirely new and different equipment is required. Additional personnel is needed for program origination. The record, as the Commission impliedly concedes, provides no accurate estimate of the increased cost that would be involved. See paragraph 25 of the first report.

The Commission recognizes that smaller CATV operations could not afford to provide origination services and concedes that there is no consensus as to the appropriate cutoff point or ability to provide origination. The Commission then arbitrarily adopts 3500 subscribers as the cutoff point.

In paragraph 24 of the first report, the Commission cites instances where CATVs, with more than 3500 sub-

scribers have lost money on origination. Only approximately 10% of the existing CATV operations now have more than 3500 subscribers. At paragraph 4 of its first report, 20 F.C.C. 2d p. 20, the Commission states: -

"4. Those commenting on behalf of CATV interests generally agreed that CATV program origination serves public interest and should be encouraged, though they almost uniformly opposed our proposal to require origination as a condition for the carriage of broadcast signals (notice, pars. 15-16). On the other hand, broadcast interests—particularly those without CATV holdings—generally urged that program origination should be prohibited altogether, or at least restricted to local originations of the public service type, and that advertising should be barred. It is claimed that this is necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service."

Thus it appears that both the CATV interests and conventional broadcasters are opposed to compulsory CATV origination.

In *Fortnightly*, the Supreme Court states that television results from the combined activity of broadcasters and viewers. After carefully analyzing the function of CATV, the Court holds that the CATV operation falls on the viewers' side of the line, and then goes on to say:

"Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is

powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

"The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." 392 U.S. 390, 399-401.

The Court went on to hold that CATV operators, like viewers, did not perform programs and hence incurred no obligation under copyright law.

The *Fortnightly* Court also recognizes the useful public service performed by CATV in making television reception possible in certain areas.

The *Fortnightly* holding that the CATV operator is not a broadcaster and that the operation falls on the viewers' side of the line affords strong support for the petitioner's contention that the Communications Act does not authorize the FCC to compel program origination.

We find no balance of public interest which requires stretching the Act to confer such authority. In so holding, we are not passing on the power of the FCC to permit CATVs to originate programs and to prescribe reasonable rules for such CATV operators who voluntarily choose to originate programs.

It is of some significance that Congress has not authorized the FCC to license CATV operation and that the Commission has not assumed authority to do so. In its order denying rehearing, it states:

"7. We note also other requests by several parties that we deal with CATV on a more comprehensive basis at this time, covering such issues as licensing, whether origination by the CATV operator should be permitted on more than one channel, regulation of common carrier operations, reporting requirements, and technical standards. We are not persuaded that all of these questions need be resolved before we proceed with the basic determinations made in the First Report and Order of October 27, 1969. CATV originations are still in their infancy and, so far as we know, common carrier operations are still in the future. These various issues are not being forgotten." 23 F.C.C.2d, 829.

CATV operators obtain their licenses or franchises from state regulatory boards or municipalities. Congress has made no attempt by legislation to preempt such authority. The Commission has not asserted a right to license CATV operators. Problems arise with respect to encroachment on state and municipal rights to franchise CATV. The record affords no basis for determining whether the local franchises granted to CATV operators include or exclude the right to cablecast. In sharp contrast, Congress has preempted the field of licensing radio and television opera-

tors. Provisions with respect to periods for which licenses may be issued and standards to be applied in granting licenses are spelled out in the statute.

It is established that cablecasting involves no use of the spectrum. Cablecasting involves a new and distinct use of electronic communication which does not utilize in any way the radio frequency spectrum of the broadcast signals regulated by the Commission. The Commission's power to adopt rules requiring cablecasting to the extent that it exists must be based on the Commission's right to adopt rules that are reasonably ancillary to its responsibilities in the broadcasting field. Cablecasting's link to television is primarily economic. As held in *Fort-nightly*, broadcast signals are dedicated to the public by broadcast studios and the right to receive and distribute them may be exercised by any one with capacity to capture the signals.

The Communications Act confers no authority to the Commission to favor one mode of electronic communication over another.

As stated by the United States in its brief, the public interest standard of the Communications Act incorporates the basic national policy in favor of competition as expressed by the antitrust laws in areas such as this where the competition does not relate to the use of the radio frequency spectrum.

In our view, the Commission's origination requirement goes far beyond the regulation of the use made of signals captured by CATV as authorized in *Southwestern Cable Co.* Petitioner is required as a condition to its right to use the captured signals in their existing franchise operation to engage in the entirely new and different business

of originating programs. Entering into the program origination field involves very substantial expenditures. Costly equipment must be purchased. Personnel must be employed who are skilled in photography, sound production, program planning and direction, and in performing. Such expense will often prove burdensome because of the limited area the program will reach. See Federal Regulation of Cable Television: The Visible Hand, Chazen and Ross, 83 Harvard L. Rev. 1820.

A high probability exists that cablecasting will not be self-supporting and that the burden thereof would likely cause substantial increase in the amount that subscribers are required to pay for CATV service and in some instances may drive the CATV operators out of business.

In *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, the Court held that the State had a right for proper reasons to grant or withhold from its citizens the right to use its highways for private purposes, but that the State could not condition the grant of such right upon the user becoming a common carrier. The Court said:

"Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

"It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the

state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights." 271 U.S. 583, 593-94.

See *Interstate Commerce Commission v. Oregon-Washington R. Co.*, 288 U.S. 14; *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 10 Cir., 100 F.2d 770, reversed on other grounds, 309 U.S. 4. Such principle applies to our present situation.

FCC's reliance upon the end use theory set out in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, is misplaced. The Court there held that FPC could consider the end use of the gas in exercising its jurisdiction over gas transmission but then goes on to say: "The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of all the circumstances weights against certification." 365 U.S. 1, 17.

In *Southwestern Cable Co.*, the FCC took the position that the regulations imposed were necessary to prevent deleterious competition by CATVs which would financially cripple conventional licensed broadcasters and discourage prospective broadcasters, and that such regulation hence was in the public interest. The FCC has now changed its position and holds the public interest requires CATV origination because broadcasters in some areas will not provide adequate service. Competition with conventional television operators is encouraged by requiring cablecasting and permitting advertising with certain limitations, all over the strong protest of licensed broadcasters. The Commission report itself shows that upon the basis of the record made, it is highly speculative whether there is

sufficient expertise or information available to support a finding that the origination rule will further the public interest. There is a distinct possibility that such requirement may force CATV operators out of business thereby making unavailable the recognized useful service performed by CATVs in areas where distance and topography impair favorable reception of television signals.

We hold that the FCC is without authority to impose the program originating rule on existing cable television operators.

Petitioner has also challenged the pay TV rules relating to program origination and the rules governing program origination. Petitioner has stated that it has no intention or desire to cablecast. Since we have held that petitioner cannot be compelled to cablecast, it would appear that petitioner has no standing to challenge such rules. Moreover, some rules are still before the Commission on petitions for reconsideration filed by other parties. Under such circumstances, we pretermitt consideration of the validity of the rules promulgated with respect to CATV operators who voluntarily elect to cablecast.

The order of the FCC requiring CATV operators to originate programs as a condition to the continuation of their CATV operations is set aside.

GIBSON, Circuit Judge, concurring.

I concur in the result. I think the FCC has authority over CATV systems but that the order under review is confiscatory and hence arbitrary.

It is certainly in the public interest for the FCC to regulate CATV systems which partake of a monopoly in

disseminating and transmitting TV programs in certain areas. Undoubtedly their operations have a substantial effect on licensed broadcasters; and from the public viewpoint they provide a real service in offering the public a wide variety of programs with improved reception. Whether they do this with less annoying and irritating commercials I do not know. It appears to the casual viewer that the commercials have over the years become increasingly longer in length, more frequent and sometimes louder so that some news programs and some motion picture programs amount to little more than a series of disjointed commercials. It is thus uncertain whether the CATV systems would give the public any relief from the ever-increasing commercials; and, of course, if the CATV systems were allowed to inject their own commercials, this would constitute an additional irritation and legal trespass upon the viewers' time. This, however, is a matter that must await future development.

Southwestern Cable recognized the CATV systems' impact on TV broadcasting and clearly upheld the Commission's authority to meet the issue in that case, while noting that the extent of the Commission's authority had not yet been judicially determined. Congress, of course, could set out the limits but has not seen fit to do so and for a variety of reasons might not act upon the problem. The FCC, therefore, will have to regulate the development of this new and important electronic development in a manner best suited to the public interest, as the need arises and the opportunity presents itself.

The *Fortnightly* case of course only considered the CATV systems as they are now constituted as a disseminator and viewer of programs rather than an originator or broadcaster. In this light CATV does not violate

the Copyright Act of 1909. The only import of this decision is that it does definitely classify the CATV systems as transmission facilities rather than broadcasting facilities. Now the FCC, by imposing originating responsibility of even a limited type on certain CATV systems, changes their essential operation from that of a pure transmission facility to that of at least a limited broadcast facility. Then once assuming a broadcast function, the CATV systems would have to be further regulated in the public interest by the FCC; and of course local origination in the CATV systems could eventually open up many avenues for mass media communication. There is, and the majority opinion does not rule out, the possibility that optional or voluntary compliance with the FCC order might take place.

While it appears to me that the FCC's rule on limited origination is in the public interest, it does not appear that the FCC has shown a sufficient basis for exercising its authority at this time. The Commission does have broad authority under 47 U.S.C. § 151, "to make available . . . a rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable charges"; but the Commission's particular order on origination, at this time at least, would be extremely burdensome and perhaps remove from the CATV field many entrepreneurs who do not have the resources, talent and ability to enter the broadcasting field. The order is thus oppressive and arbitrary at this time, but that does not mean that with the continued development of the CATV systems and with the systems' impact upon broadcasting, it might not in the future be advisable and in the public interest to compel origination of local programs. It would appear to me that the CATV systems should be permitted

to remain basically a transmission facility at this time, with allowance for the CATV systems to experiment on origination without being compelled to do so.

Another difficulty is in now assessing future development of the CATV systems' operation. The FCC is to be commended in attempting to anticipate how this electronic phenomenon can and should be used in the public interest. This can be done by allowing experimentation with voluntary origination without placing a burden that to some would be confiscatory.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B
JUDGMENT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 20439.

Midwest Video Corporation,
Petitioner,

v.

United States of America and
Federal Communications Com-
mission,

Respondent.

On . Petition for
Review of Or-
ders of the Fed-
eral Communi-
cations Commis-
sion.

[September Term, 1970]

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the Federal Communications Commission in this cause requiring CATV operators to originate programs as a condition to the continuation of their CATV operations be and is hereby, set aside in accordance with the majority opinion of this Court this day filed herein.

May 13, 1971.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

CATV

201

F.C.C. 69-1170

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
 AMENDMENT OF PART 74, SUBPART K, OF THE
 COMMISSION'S RULES AND REGULATIONS REL-
 ATIVE TO COMMUNITY ANTENNA TELEVISION
 SYSTEMS; AND INQUIRY INTO THE DEVELOP-
 MENT OF COMMUNICATIONS TECHNOLOGY AND
 SERVICES TO FORMULATE REGULATORY POL-
 ICY AND RULEMAKING AND/OR LEGISLATIVE
 PROPOSALS

Docket No. 18397

FIRST REPORT AND ORDER

(Adopted October 24, 1969)

BY THE COMMISSION: COMMISSIONER BARTLEY CONCURRING AND ISSUING
 A STATEMENT; COMMISSIONER ROBERT E. LEE DISSENTING AND IS-
 SUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN THE
 RESULT.

1. The Commission's "Notice of Proposed Rulemaking" and "Notice of Inquiry," issued on December 13, 1968 (15 F.C.C. 2d 417, 33 Fed. Reg. 19028), divided this proceeding into five parts. Under that notice and subsequent orders, the filing times for comments and reply comments on various parts, or portions thereof, were scheduled for different dates. Comments and reply comments on paragraphs 11-20 and 23-25 of part III of the December 13th notice have been received and considered by the Commission. This first report and order treats only some of the matters involved in those paragraphs, i.e., CATV program origination, its economic basis and the proposed equal time, sponsorship identification, and fairness requirements.

2. In this connection, we wish to emphasize that in this complex rulemaking proceeding, it would be wholly impracticable to attempt to issue a comprehensive set of rules governing all aspects. Rather, we shall split off parts for action, deferring action on other parts pending further analysis or further proceedings. Thus, while we act here on CATV origination, whether it should be required, whether commercials should be allowed, and certain basic requirements such as equal opportunities for political candidates, fairness, and sponsorship identification, we have not acted on the related diversification issues. Clearly, with origination, there should be multiple ownership rules, particularly with respect to cross-ownership of broadcasting and CATV facilities in the same area. But since the diversification issues require lengthier analysis and study, we act now, as we can, in the above-noted areas. For, it is, we think, of the utmost importance that

we supply needed guidance to the industries involved, to State and municipal entities, and to other interested persons, as to the Federal regulatory policies in this vital area. Moreover, we note that Congress is considering legislation in this area. While the legislation is believed to be aimed essentially at resolving the unfair competition issues treated in part IV of the notice, our policies in the origination area (pt. III) may also be relevant to the Congress in its consideration of the above-noted legislation. We think it desirable, therefore, that Congress be fully informed of these policies, so that it may take them into account, either as appropriate background to the legislation or as matters to be included in the legislation. We state, as we have before, that in this important new area we welcome congressional review and whatever guidance Congress may wish to afford.

I. CATV PROGRAM ORIGATION IN GENERAL

3. In paragraphs 12-14 of the notice the Commission set forth its tentative view that CATV program origination is in the public interest and should be encouraged. We further stated our belief (pars. 12, 26) that the public interest would be served by encouraging CATV systems to operate as common carriers on some channels in order to afford an outlet for others to present programs of their own choosing, free from any control of the CATV operator as to content (except as required by the Commission's rules or applicable law), and to provide other communications services. These tentative conclusions recognize the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services (notice, pars. 5, 13). They also reflect our view that a multipurpose CATV operation combining carriage of broadcast signals with program origination and common carrier services, might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created: "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges * * *" (sec. 1 of the Communications Act). After full consideration of the comments filed by the parties, we adhere to the view that program origination on CATV is in the public interest.

4. Those commenting on behalf of CATV interests generally agreed that CATV program origination serves public interest and should be encouraged, though they almost uniformly opposed our proposal to require origination as a condition for the carriage of broadcast signals (notice, pars. 15-16). On the other hand, broadcast interests—particularly those without CATV holdings—generally urged that program origination should be prohibited altogether, or at least restricted to local originations of the public service type, and that advertising should be barred. It is claimed that this is necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service.

5. We are not persuaded that the position of the broadcasters has merit. In the first place, if the public is to be provided with additional program choices and different types of services and chooses to take advantage of them, it appears inevitable that there may be less viewing of the previously existing services.¹ However, we do not think that the public should be deprived of an opportunity for greater diversity merely because a broadening of selections may spread the audience and reduce the size of the audience for any particular selection. Such competition for audience attention is not unfair, since broadcasters and CATV originators (both the CATV operator and others originating on common carrier channels), stand on the same footing in acquiring the program material with which they compete.

6. Second, a loss of audience or advertising revenue to a television station is not in itself a matter of moment to the public interest unless the result is a net loss of television service. *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 475-476; *Carroll Broadcasting Co. v. Federal Communications Commission*, 258 F. 2d 440 (C.A.D.C.). The Commission has repeatedly recognized, of course, that a CATV-caused loss or deterioration of free broadcast service would be detrimental to the public interest since it does not presently appear that CATV could replace such service for viewers not economically reached by cable or those unable to afford CATV charges. However, despite much speculation in the comments, we find no factual basis in this record or other persuasive reason for concluding that CATV origination is likely to cause such a loss in the near future (i.e., the next decade).²

7. Contrary to the misconception in some of the comments, the December 13 notice did not propose to restrict CATV to local originations or to bar originations of the entertainment type or to preclude CATV network operations on an interconnected basis, and our finding as to absence of any real basis for the asserted fears of the broadcasters is not based on any restrictions of this nature. While we regard augmented opportunities for community self-expression as extremely important, the Commission has also sought to promote new national and regional television networks generally and intends actively to explore this possibility for CATV (see e.g., notice, footnote 8 and par. 60). Our experience in the broadcast field (both commercial and noncommercial), as well as comments filed in this proceeding, leads us to believe that the successful inauguration of any new network is not an easy matter, to a significant extent because of the high cost and other difficulties in producing or otherwise procuring programming in sufficient quantity and quality for network operations.³ Moreover, CATV faces an additional hurdle in that its present subscriber base, while affording fees not available to broadcasters, is nevertheless far smaller than the potential audience open to a new broadcast network. This situation might change substantially if CATV systems commenced

¹ It is possible, of course, that some of the viewers of the new services may be persons who either did not watch the old services or who increase their viewing hours in light of the added diversity. To that extent, CATV program origination may not affect the audience previously available to the broadcast service.

² The above statement is to be contrasted with the views expressed in *Midwest Television, Inc.*, 13 F.C.C. 2d 478, and pt. IV of the Dec. 13 notice herein as to CATV operations with distant signals in major markets under present circumstances.

³ Another very important factor in the broadcast field is the present lack of competitively equal outlets in many markets.

operations in major population centers, achieved high penetration percentages, and found ways to expand their service to outlying areas through microwave or other technological means. However, we think that in any event it would be a substantial period of time before any CATV network is in a position generally to outbid the broadcast service for the programming now presented by that service or to siphon off audience and advertising revenue to a degree that might have detrimental impact on established broadcast service to the public. See also, here, the discussion in paragraphs 9-10, *infra*.

8. Third, and most important, in the event that adverse consequences on service by individual stations or broadcast networks should develop or appear imminent, the Commission can and would take such remedial or preventative action as may be necessary to preserve service to the public. As stated in the notice (par. 14), "the Commission's authority to regulate the use of broadcast signals as a base for CATV program origination encompasses power to adopt regulations reasonably designed to prevent such operations from having detrimental consequences to the public interest and to promote their development along lines likely to maximize the potential benefits to the public." We intend to keep a watchful eye on the progress and impact of CATV origination and will be alert to protect the public against any significant overall loss or impairment of television service.

9. In the field of broadcast subscription television, we have already adopted certain measures designed to avoid any adverse impact on free broadcast service. *Subscription Television*, 15 F.C.C. 2d 466, 504-509. The Commission clearly has the authority, we believe, to impose similar or other appropriate safeguards for CATV origination. We believe that we should leave this an open matter, for further consideration (if the need arises) either at some later date in this rulemaking proceeding or in another rulemaking proceeding, to be commenced after we gain some further experience in this area.

10. We shall expand briefly on our reasons for now treating over-the-air and wire pay-TV differently. First, we note that, in the former field, we have data from the Hartford trial. We recognize the potential of the over-the-air pay-TV service, with its ability to reach large numbers of persons throughout the station's service area, and to obtain revenues on a per program basis. The development of pay-TV on CATV systems is much more difficult to foresee at this time. There has been no comparable experiment or test of a substantial nature. The large community remains to be wired, from almost a zero starting point. We have not authorized the use of distant signals without payment as a base for CATV operations in the larger markets. We are reluctant to take any further action which might inhibit cable development in these markets, unless and until experience gives some indication of a trend calling for action in the public interest. It may be that CATV systems, while originating some programming of types which might be found on free television, would not obtain such revenues that—taking into account its penetration in these markets—there would be any significant diminution of fare presently available free

* We note that, unlike operation with distant signals (see notice, para. 34, 36), we have no present indication of the degree of penetration CATV, operating with originations but no distant signals, might achieve in these large markets. This, however, is a significant factor to be included in the public interest judgment discussed above.

to the American public. Finally, we do impose one restriction on CATV designed, in part, to insure that the public will receive, to some significant extent, a different service; namely, that the programming originated on cable cannot be interrupted by commercials (i.e., commercials permissible only at natural breaks). See discussion, *infra*, paragraphs 31-38. In short, it appears to us that wire origination operations in the larger markets may face different, and perhaps more difficult, problems than over-the-air pay-TV; that we lack any present substantial experience in this respect in the wire area; and that, therefore, the public interest would be best served for the present by encouraging CATV to experiment and develop its originations free from restriction as to interconnection or limitations as to types of programming, in the expectation that the end result will be significant added diversity for the public. We stress again that this is simply our conclusion as to how best to proceed at this initial stage, and that as we gain experience, we can take such action as may be required in the public interest.

11. We also deem it appropriate at this time to amplify our view that CATV systems should be encouraged, and perhaps ultimately required, to lease cable space to others for originations of their own choice on a local or interconnected basis, in order to promote diversity of control over the media of communication and diversity of program choices as well as to increase the opportunities for television communication with the public by more widespread sources. We adopt no rules at this time, since this is an area which we believe requires further study and analysis of the comments.

12. The most marked potential of the cable technology for enhancing communications services to the public stems from its expanding channel capacity. CATV cable started with five channels or less; now generally has 12, and holds promise of 20-40 or more. From a diversity standpoint, it seems beyond dispute that one party should not control the content of communications on so many channels into the home. For, it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20; *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367; *United States v. Storer Broadcasting Co.*, 351 U.S. 192; *The Goodwill Stations, Inc. v. Federal Communications Commission*, 325 F. 2d 637, 640 at footnote 5; *First Report and Order in Dockets Nos. 14895 and 15233*, 38 F.C.C. 683, 699-700.

13. In one sense, as pointed out in the comments, traditional CATV operations further the goal of diversity simply by carrying multiple broadcast signals. While CATV operators select the signals carried (within the confines of the applicable Commission rules), they generally have no control over the content of the communications on the signals selected.⁶ However, the principle of diversity encompasses more than diversity of control; it includes also the important factor of

⁶ This kind of diversity is diminished if the CATV operator has an ownership interest in broadcast stations carried on the system, or if he "programs" a channel by selecting programs from a number of distant stations. In such cases, he is no longer a passive conduit for program services designed by others.

diversity of program choices available to the public. As reflected in our proposal to require CATV program origination as a condition for the carriage of broadcast signals, we do not think, given the present broadcast mode of operations, that significant additional program choice can be obtained by simply adding more broadcast signals to provide 20-40 channels of programming to subscribers. There are only three national television networks and a large percentage of our broadcast stations are affiliated with these networks. While network-affiliated stations also present nonnetwork programs and there are an increasing number of independent and educational stations, stations in different communities broadcast substantially the same nonnetwork programs over any extended period of time.* See, e.g., *Midwest Television, Inc.*, 15 F.C.C. 2d 478, 484, 501. Thus, beyond basic broadcast services (consisting of the signals of the three networks, one independent, and one educational station), the diversity gained by cumulative broadcast signals is largely a matter of choice of viewing times, rather than any real additional choice in terms of new or different programming. We believe that much more significant additional choice of programming is likely to be achieved in the long run if some cable channels are devoted to program origination.

14. While we have accordingly concluded that, at least for the present, CATV operators should be eligible to engage in program origination, and encouraged or even required to do so, the December 13 notice proposed to limit origination by the CATV operator (apart from automated services) to one channel. This proposal is based on our tentative view that one entity should not control the content of the program materials on all cable channels not used for carriage of broadcast signals. It also accords with the long-standing principle in the television broadcast field that one entity should not be authorized, or have an interest in, more than one television channel serving the same area. In other words, the proposed one-channel limitation is designed to promote diversity of control and not to limit the quantity of origination on the cable or to restrict the opportunities for achievement of maximum diversity of program choices to the public. On the contrary, the realization of such benefits for the public is the Commission's basic goal, and we think that they are more apt to be achieved if others besides broadcasters and CATV operators have access to the cable channel capacity to reach the public with communications of their choice, free from control by the CATV operator as to content. The comments have raised the issue of whether there should be a limitation based on percentage of channels (e.g., to take into account the difference between a 12-channel and a 40-channel system), or whether there should be an initial period in which the CATV operator would not be restricted to only one channel for origination. We shall consider these alternatives in our subsequent reports in this general area of diversification. It is sufficient to note here that there is clearly need for regulatory action in this respect.

15. There is also, in our opinion, a need for additional means by which various entities can communicate with the public via television

* Indeed, it is this which causes broadcaster concern as to methods of affording independent stations (and network stations to the extent that they present nonnetwork programs—generally about 45 percent of their schedule), some measure of exclusivity against duplication by other, more distant broadcast signals carried on the cable.

at low cost. Access to the public via the broadcast medium is necessarily restricted to a few, and those able to obtain a license—though under an obligation to operate in the public interest—are not common carriers (see sec. 3(h) of the Communications Act) and generally retain control over access to their facilities by others. Cf. *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367. Moreover, cable television service has tended to develop on a non-competitive monopolistic basis in the areas served, so that only one cable enters the subscriber's premises. Persons who are not in a position to engage in broadcast or CATV operations or to acquire time—or as much time as desired—on the broadcast media, could nevertheless obtain television access to the public if a portion of the channel capacity of a community's only cable system were reserved for their use on a common carrier basis. As indicated in the notice (pars. 8, 26), those desiring such access might include political candidates, municipal and State governmental authorities, educational interests, civic and professional organizations, amateur dramatic groups, professional program producers, advertisers, etc. Other entities might well take advantage of the facilities if they were made available on this basis.

16. In light of the foregoing, it is our opinion that the public interest would be served by encouraging CATV systems to operate as common carriers on some channels. Entities desiring to do so should be permitted to communicate with the public in a community, or in a particular segment of a community, or in a number of communities on a State, regional, or national basis to the extent that cable facilities are "available and are interconnected." CATV operators should be able to furnish studio facilities and technical assistance as part of the service, but should have no control over program content except as may be required by the Commission's rules and applicable law. And here, again, we think that at present innovation and experimentation should be encouraged and that such public use of CATV facilities should be free from restriction by local, State, or Federal authority (or by private parties) as to the types of program material to be presented (with the exception of possible restrictions applying to illegal lotteries, obscenities, etc.). However, action will be forthcoming only after further study.

17. We believe it important also to set out the Commission's position on two other matters—interconnection of cable systems and commercials on origination channels. The Commission would feel compelled to oppose on behalf of the public, any proposal which would preclude CATV systems from leasing channels to others for program origination of any kind or from interconnecting on a regional or national basis for any purpose, including the distribution of entertainment type programming. We strongly believe that the promise of this new technology should not be stifled by foreclosing the possibilities that some of these 20-40 channels might be opened to others on a common carrier basis and that significant new diversity of programming and other

¹ We recognize, of course, that systems with smaller channel capacity may have less space to offer for use by others than systems with many channels, and that some may have nothing left after providing for carriage of broadcast signals and CATV origination. In par. 25 of the notice, the Commission posed a question as to whether automatic services should be subject to displacement if there is a greater demand for leased channels than can be accommodated. A similar issue might ultimately arise with respect to a possible ceiling on the number of broadcast signals that may be carried where channel scarcity is a factor.

services might be brought to the American people through regional or national interconnection, including competition to the present three national television networks. In the domestic satellite proceeding it has been suggested that CATV cable channel capacity might be utilized as a means for local distribution of satellite communications. Finally, we note that the public interest would be best served by permitting CATV operators to derive revenues from commercials to help defray the cost of their originations, or programming presented by others on leased channels, and provide the public with a new type of service—one where commercials occur only at natural intermissions or breaks in program material (see pars. 31-38 below).

II. SPECIAL RULEMAKING PROPOSALS

A. *Required origination and the economic basis*

18. *Origination requirement.*—In the December 13 notice, the Commission proposed to require origination by all but small systems as a condition for the carriage of broadcast signals (pars. 16-17). Most of those favoring encouragement of origination (with some exceptions such as the city of New York and the Screen Actors Guild) were opposed to any mandatory requirement. Apart from jurisdictional challenges, it is asserted that CATV systems should retain flexibility to do as they judge best in their own circumstances, that origination is beyond the means of many existing systems; and that a requirement imposed on a reluctant operator might result in token compliance rather than the initiative and experimentation needed to develop the full potential.

19. After full consideration of the comments, we remain of the view that the public interest would be served by conditioning, where practicable, the carriage of broadcast signals upon a requirement for program origination. It appears to us that this would be the most effective way to encourage origination. While such a requirement would make no difference for those systems who would voluntarily originate in any event, it should stimulate origination by systems which would otherwise not do so.⁸ Moreover, we think it reasonable to place this condition on the carriage of broadcast signals. The use of broadcast signals has enabled CATV to finance the construction of high capacity cable facilities.⁹ In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to "encourage the larger and more effective use of radio in the public interest" (S.C. 303(g)). The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States

⁸ It appears from the comments, for example, that one CATV system (717 subscribers) is required by its franchise to originate, and does originate, a substantial variety of programs for approximately 30 hours a month. A commonly owned system in the same State (1,154 subscribers) is under no such requirement and does not originate any programming.

⁹ Moreover, we have proposed the use of 12-GHz frequencies in a local distribution service to permit CATV systems to achieve economies in construction and to expand their service areas. Notice of proposed rulemaking in docket No. 18432 (F.C.C. 69-141).

and communities (sec. 307(b)), in areas where we have been unable to accomplish this through broadcast media.

20. In addition, the origination requirement will help ensure that origination facilities are available for use by others originating on leased channels. We think that this is necessary as a practical matter if the public is to take advantage of any common carrier offering on a widespread basis. It is unlikely that many would-be lessees would possess their own origination equipment and studio, particularly those desiring only occasional use. For example, political candidates cannot make effective use of cable facilities for communication with the public unless the CATV system has origination equipment and provides technical assistance. In view of the importance of an informed electorate and speech concerning public affairs to self-government, the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences", and the CATV system's monopoly position over cable access to the subscriber's premises, we think that CATV operators have an obligation analogous to that of the broadcasters "to give suitable time and attention to matters of great public concern" and also to have the equipment needed for origination by others. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 389-394. The Commission is not powerless to insist that CATV do so as a condition for the use of broadcast signals, and certainly for the use of microwave radio frequencies in the conduct of its business. Moreover, in authorizing the receipt, forwarding, and delivery of broadcast signals, the Commission is in effect authorizing CATV to engage in radio communication, and may condition this authorization upon reasonable requirements governing activities which are closely related to such radio communication and facilities. Sections 2(a), 3(b), and 301 of the Communications Act.

21. While the public interest would be served by origination on as many systems as possible, and the public need may be greatest in small CATV communities lacking local television broadcast media, we recognize the validity of the argument that origination may be beyond the means of some systems. The notice specifically requested suggestions as to a possible cutoff point for mandatory origination in light of the cost of equipment and personnel minimally necessary for local origination. Some of the comments have been very helpful in this respect, particularly those of TeleMation, Inc.; Winchester TV Cable, Inc.; Jefferson-Carolina Corp.; Port Huron TV Cable Co.; Chillicothe Telecom, Inc.; and the filings based on the TeleMation study (e.g., Jerrold Corp.; Buckeye Cablevision, Inc.; etc.).

22. TeleMation, a manufacturer of cablecasting equipment, appended as table I to its filing the following summary of estimated costs of construction and operation of five cablecasting systems of varying degrees of sophistication (ranging from a full color system with two live vidicon cameras and a mobile van to a minimum monochrome system in which the weather channel (TM) doubles as a live camera):¹⁰

¹⁰ TeleMation's estimated costs have been used by a number of those filing on behalf of CATV systems, and have not been challenged in the comments of others.

Costs and technical data*

	Color system	Complete mono-chrome system	Basic mono-chrome system	Small mono-chrome system	Minimum mono-chrome system
Television equipment.....	\$80,000	\$36,000	\$19,000	\$7,900	\$4,485
Studio construction and furnishings.....	15,000	9,000	5,300	1,600	
Total facilities cost.....	95,000	45,000	27,300	9,500	4,485
Annual principal and interest on 5-year schedule of amortization.....	22,200	10,510	6,315	2,220	1,050
Operating costs—Annual labor (with G&A):					
Director.....	14,400	14,400	9,450	4,720	1,000
Technician.....	10,150	5,075	2,550	2,550	500
Other.....	4,000	3,000	1,000		
Total labor.....	28,550	22,475	13,000	7,270	1,500
Maintenance.....	2,850	1,350	820	285	125
Power.....	325	240	180	100	50
Promotion.....	1,200	600	300	180	
Total operating costs—Annual.....	33,925	24,665	14,300	7,805	1,675
Total annual cost of facilities and operation.....	58,125	35,175	20,615	10,025	2,725
Number of subscribers needed to support cablecasting.....	1,150	730	430	215	55
Percent of net subscriber revenue needed to support cablecasting.....	15	16½	17	21½	11
Other costs—Annual:					
(a) Weather channel.....	\$1,285	Included	Included	Included	Included
(b) Message channel.....	535	\$535	\$535	\$340	\$340
(c) News and stock channel.....	8,400	8,400	8,400	8,400	
(d) Films.....	9,600	9,600	6,000	(¹)	(¹)
(e) Modulators—as needed at \$1,000/channel.....	470	470	470	470	235
Total other costs—Optional.....	20,290	19,005	15,405	9,210	575
Number of subscribers needed to support additional cablecasting options.....	425	395	325	190	12
Percent of net subscriber revenue needed to support cablecasting.....	4	9	13	19	3

*TeleMation appends the following notes to its analysis of cablecasting costs set forth above:

Line 1.—Television equipment includes: All video, audio, lighting (excluding overhead pipe grids and power distribution), and installation in prepared studio. Television equipment also includes modulators to convert video and audio signals to proper channel frequency.

Line 2.—Studio construction assumes that ownership is taken for a new or renovated building including air conditioning, power distribution and minimum space required for satisfactory programming. Costs and space estimated for cablecasting systems are described in system descriptions.

Line 3.—Assumes 25 percent downpayment, 4½ percent add-on interest, over a 5-year period of amortization and payment.

Line 4.—Operating costs were estimated as follows:

1. Labor—

(a) Director at \$850 per month, plus 7 percent payroll benefits, plus 35 percent other G and A costs.

(b) Technician at \$600 per month, plus same benefits and G and A ratios as above.

(c) Other labor costs include miscellaneous part-time help and time sharing of other system personnel.

(d) Amount of labor man hours allocated is less than full time for basic, small and minimum systems.

2. Maintenance is 3 percent of facilities cost per year.

3. Power cost assumes adequate lighting and other requirements for studio equipment at \$0.08 per kw. hour. Studio is assumed to be in operation for programming for approximately 3 hours per day for 300 days annually. Automatic equipment operates 24 hours per day.

4. Promotion is considered to be in addition to regular system promotion expenses.

Line 5.—Subscriber income assumes \$60 per year gross (\$5 per month) less 20 percent for revenues paid directly for such things as franchise costs and other out-of-pocket expenses, resulting in a net revenue of \$48 per year per subscriber.

¹ Percent of \$7,500.

² Percent of \$4,500.

³ Percent of \$2,500.

⁴ Percent of \$1,000.

⁵ Percent of \$500.

⁶ Not available.

23. According to TeleMation, the complete monochrome cablecasting system includes:

Two live vidicon cameras with zoom lenses.

One film chain with two 16 mm. projectors, one 35 mm. projector and a film chain camera.

Minimum necessary lighting and audio equipment to produce professional looking programs.

EIA-RS 170 standards for video signal. Cameras are of high quality with 800 to 1,000 lines of horizontal resolution and a signal to noise ratio of approximately 50 db.

Two video tape 1-inch helical scan recorders.

Fader type switching with preview.

Screen splitter special effects generator.

Adequate monitoring and test equipment.

Control console with necessary remote controls and intercom system.

Automatic weather channel (TM) with slides on same channel.

One thousand square feet of studio space at \$8 per square foot plus \$1,000 furnishings.

No mobile van is included, but the equipment is designed so that necessary equipment for remote cablecasting can be transported satisfactorily in a station wagon or other company vehicle.

The basis monochrome system includes:

Single live camera with zoom lens.

One film chain connected to the weather channel (TM) with one 16 mm. film projector and one 35 mm. film projector.

Minimum necessary lighting and audio to produce professional looking programs.

EIA-RS 170 standards of video signal. Cameras are of high quality with 800 to 1,000 horizontal resolution and signal to noise ratio of approximately 50 db.

Two video tape 1-inch helical scan recorders.

Vertical interval switching with preview.

Minimum monitoring equipment.

Automatic weather channel (TM) on same channel.

Six hundred square feet of studio space at \$8 per square foot, plus \$500 furnishings.

No mobile van is included but equipment is designed so that equipment can be satisfactorily transported in a station wagon or other company vehicle for remote programming.

The color system is more elaborate than the above two, whereas the small and particularly the minimum monochrome systems are much more modest.²¹

24. There is no general consensus in the comments as to an appropriate cutoff point for an origination requirement. Micanopy Group Cos. state that origination should not be required for systems serving fewer than 2,000 subscribers, whereas Garden Spot Cable TV Services, Inc., asserts that systems with less than 2,500 subscribers are not in a position to produce meaningful local program origination. Port Huron

²¹ TeleMation states that the small monochrome system includes:

Single live camera with zoom lens. Synchronizing standards are reduced to industrial two-to-one interlace. There is no video processing outside of that produced by the camera itself. Horizontal resolution is reduced to approximately 550 lines and signal to noise ratio is reduced to approximately 35 db. The cameras are less adaptable to broadcast style operating techniques. The zoom lens is reduced in range and type of controls.

There is no film chain although the weather channel (TM) has a projection slot for rented projectors.

Minimum lighting and audio.

One video tape 1-inch helical scan recorder.

One weather channel (TM) with reduced number of weather instruments.

Minimum monitoring.

Four hundred square feet of studio space at \$4 per square foot as a refurbishing cost.

The camera and video tape recorder can easily be transported in an ordinary automobile for remote cablecasting.

TV Cable Co. states that it lost money on origination for 3 years until it reached 3,500 subscribers, and is making a modest profit with 4,900 subscribers.¹² TeleMation has appended the cablecasting schedule of the CATV system in South Lake Tahoe, Calif. (3,750 subscribers), which shows a variety of originations for several hours daily, 5 days a week. Chillicothe Telcom, Inc., asserts that it is not breaking even with 4,700 subscribers, but hopes to do so by the end of 1969.¹³ Jefferson-Carolina Corp. originated on its system in Cheraw, S.C. (population 5,000), on a minimum budget with modest capital investment and found that operating expenses were entirely defrayed by advertising revenue; yet its experience was to the contrary in Lumberton (population approximately 15,000). Several parties urge that size should not be the only controlling factor, as smaller communities lacking other local outlets may have a greater need for—and give more support to—CATV origination than larger communities with other local media and higher demands as to quality. It is further asserted that there should be a grace period for experimentation before any requirement becomes effective. Those commenting on behalf of CATV interests are in agreement that advertising should be permitted to help support the cost of origination.

25. While some of the parties have supplied valuable information concerning their experience with origination, its cost and the size of the systems involved, it is obvious that the systems discussed in the comments constitute only a small percentage of the systems now engaged in origination and may not be typical of the norm. According to TV Factbook, services volume (1969-1970 edition, No. 39, pp. 363-a to 591-a), approximately 206 CATV systems are currently engaged in program origination (e.g., local live, film, video tape),¹⁴ and a substantial number of additional systems plan to originate. Of the 206 systems currently originating, the number of subscribers is approximately as follows:

Number of subscribers:	Number of systems
Under 500	18
500-1000	36
1000-2000	50
2000-3500	39
3500-5000	24
Over 5000	39

See also the September 22, 1969, issue of *Broadcasting Magazine*, p. 46, concerning a recent NCTA survey on cablecasting and advertising by

¹² Port Huron originates 5-10 hours of local public service programming a month with black and white equipment which cost \$55,500. Present annual operating costs (sharing personnel of a television station at little or no cost to the system) are \$72,000, not including \$25,000 worth of services performed by shared personnel. Port Huron does not have much needed remote control equipment; nor is it equipped for color, though its subscribers frequently ask for such service.

¹³ Chillicothe has been originating 60 hours a month since 1964, with commercials since 1967. While it was then forced to use broadcast gear costing \$200,000, Chillicothe states that it could now purchase the same thing in CATV equipment for \$141,500. Annual operating costs are \$106,250 (sharing some regular CATV personnel). Chillicothe competes for advertising with two local radio stations and a newspaper, and sells in the same manner as the radio stations—charging \$3 per spot.

¹⁴ These 206 systems do not include systems originating only automated services (such as time and weather, news ticker, stock ticker, emergency warning system, fire alarm system, etc.), music, and/or community and public service announcements. Nor does this figure include systems engaged in other origination where the number of subscribers was not available.

its members. Except in a few instances, the record contains no data about origination by these systems and such pertinent matters as the kinds and amount of origination, equipment used, cost of facilities, annual operating costs, personnel involved, advertising, financial success, or the response of the public to such origination efforts.

26. In the circumstances, we have decided not to prescribe a permanent minimum cutoff point for required origination on the basis of the record now before us. The Commission intends to obtain more information from originating systems about their experience, equipment, and the nature of the origination effort. We shall also issue a further notice of proposed rulemaking calling for additional public comment in light of the matters discussed herein. In the meantime, we will prescribe a very liberal standard for required origination, with a view toward lowering this floor in the further proceedings, should the data obtained in such proceedings establish the appropriateness and desirability of such action. The matter thus remains partially an open one, to be determined finally upon further analysis and experience.

27. The rules set forth in the appendix hereto (see sec. 74.1111(a)) make the origination requirement applicable to systems with 3,500 or more subscribers, effective January 1, 1971. This standard appears more than reasonable in light of the TeleMation filing,¹⁵ our decision to permit advertising at natural breaks (see pars. 31-38 below), and the 1-year grace period. Moreover, it appears that approximately 70 percent of the systems now originating have fewer than 3,500 subscribers; indeed, about half of the systems now originating have fewer than 2,000 subscribers. We recognize that the 3,500 standard will encompass only a very small percentage of existing systems at present subscriber levels, less than 10 percent.¹⁶ However, it should cover most existing and new systems in the nation's larger communities where the Commission is seeking to promote a new kind of CATV operation, based on good reception of local signals, program origination by the CATV operator and others, and possibly the provision of additional communications services to the public (see Dec. 13 notice, pars. 46, 60-61).

28. As pointed out in the comments, smaller communities lacking other local television outlets, or dependent upon only one, have a greater need for local origination and may give more support to CATV origination even if conducted on a comparatively modest basis. A small monochrome system, modest in equipment and cost, would never-

¹⁵ In so concluding, we have made allowance for the circumstance that TeleMation's estimate of costs may be too low in some respects, e.g. 4½ percent interest expense and labor costs.

¹⁶ The record reflects the following with respect to present system size:

Number of subscribers	Estimated percent of systems, 1969	Number of systems as of 1969
80-499		
500-999	50.0	1,130
1,000-2,499	19.5	440
2,500-4,999	19.0	430
5,000-9,999	7.5	170
Over 10,000	3.0	70
	1.0	20
	100.0	2,360

theless permit subscribers to view locally produced programming that otherwise might not be available at all; for example, a debate between local political candidates, a talk by the mayor or a local newscast. It would also afford a television outlet for advertising by local businessmen, who may have no interest in reaching the broader area outside of their market served by a television broadcast station. Moreover, the equipment of the small system (camera and video tape recorder) can be transported in an ordinary automobile for remote cablecasting. The circumstance that so many systems with fewer than 3,500 subscribers (approximately 140) have voluntarily undertaken at least some origination and a substantial number of others plan to do so, seems to indicate a fairly widespread industry belief that origination by comparatively small systems is feasible. Since any effort in that direction is very important in the public interest, we urge cable operators, as does NCTA, to do whatever they can to help satisfy this need. However, until more information is obtained in the further proceedings, we think that origination by smaller systems should continue to develop on a voluntary basis.

29. Clarification has been requested as to the meaning of the phrase "operate to a significant extent as a local outlet by originating" (par. 15 of the notice). By significant extent we mean something more than the origination of automated services (such as time and weather, news ticker, stock ticker, etc.) and aural services (such as music and announcements). Since one of the purposes of the origination requirement is to insure that cablecasting equipment will be available for use by others originating on common carrier channels, "operation to a significant extent as a local outlet" in essence necessitates that the CATV operator have some kind of video cablecasting system for the production of local live and delayed programming (e.g., a camera and a video tape recorder, etc.). If the cablecasting equipment and technical personnel are available, there should be a natural tendency for the CATV operator to use them for some origination presenting local personages and events. However, as earlier indicated, we do not mean to suggest that origination to a significant extent could not also include films and tapes produced by others,¹⁷ and CATV network programming.

30. We will also refrain from any initial regulation relating to the hours of origination, categories of programming, the type of cablecasting equipment, and technical standards. As suggested in the comments, it appears appropriate to afford a period for free experimentation and innovation by the cable operators. Should it ultimately turn out that some requirements are necessary (e.g., equipment, technical standards, minimum hours of operation), we are in accord with the further suggestion in the comments that it would be reasonable to expect more of larger systems than small ones.¹⁸ Moreover, we would

¹⁷ We note that TeleMation has appended as exhibit C information about films produced by Interpet Productions, Inc., of Laguna Beach, Calif., for CATV systems in southern California. TeleMation states that such programs are geared to cable audiences, having been designed to supplement the programming fare available on television broadcast stations. The record further indicates that programs produced by other such organizations are available to CATV systems, e.g. American Diversified Services, Kingsport, Tenn.; Leeder Cable Services, Inc., Oceanside, N.Y.; Programming Corp. of America, Houston, Tex.; Gridtronics, Inc., New York, N.Y., etc.

¹⁸ However, TV Factbook indicates that some smaller systems apparently do more hours of local live origination than some of the larger systems.

anticipate that any requirements might be quite liberal at the outset until the origination operations have had a reasonable opportunity to become established, as in the case of television broadcasting where the required minimum hours of operation are very small for the initial 18 months and gradually increase during four successive 6-month periods (sec. 73.651 (a) of the Commission's rules).

31. *Economic basis.*—After consideration of the comments, we have concluded that advertising should be permitted at natural breaks in originations with no interruption of program continuity. It appears that advertising support (or some other revenue besides regular subscriber fees) may be necessary to contribute to the financing of local origination in some communities, in view of what the record reveals as to the cost of origination equipment and operating expenses.¹⁹ Moreover, advertising support may enable origination operations by smaller systems in smaller communities than would otherwise be the case.²⁰ There is also indication in the record (e.g., the comments of the Department of Justice; those filed on behalf of Jerrold Corp. and others; Ameco, Inc.; Wheeling Antenna Co., and the American Association of Advertising Agencies) that some advertisers need additional television outlets, particularly those interested in reaching the limited audience served by a CATV system as compared to the much larger audience within the grade B contour of a television broadcast station.

32. There are, of course, other considerations which must be weighed. The American Civil Liberties Union asserts that advertising on CATV origination would subject CATV to the same motivation as the broadcaster to present programming designed to attract the largest possible audience. Hence, in order to encourage programming for minority audiences, it is urged that advertising should be prohibited, and that any additional financial base to support the costs of origination should be obtained from additional charges to subscribers viewing the originated programs. While this is one of the alternatives proposed in the notice, we think that considerations of practical necessity dictate a different course. Some systems in areas where the need for local origination is greatest simply may not have enough subscribers to support the costs of cablecasting equipment and personnel, even if basic fees are increased or per program fees are charged. Moreover, larger systems in larger communities may be faced with higher origination costs. There are important public benefits to be gained from having cablecasting equipment available on as many systems as possible for local production of programs by the CATV operator and others. In our judgment, these benefits are more likely to be realized on a widespread basis at an early date if we permit advertising at natural breaks than if we insist upon a mode of operation that may be more difficult and take longer to achieve.

33. However, we will leave open the question of whether advertising should be permitted in conjunction with possible eventual CATV net-

¹⁹ Despite the claimed importance of distant signals to cable operations in major markets, all of the CATV comments addressing this question claim that subscriber fees alone cannot support origination, and that advertising revenue is necessary.

²⁰ It is asserted in some of the comments that advertising should not be permitted for the purpose of encouraging origination as there is no guaranty that the CATV operator would devote the proceeds to origination. We do not regard this as sufficient reason for depriving CATV of access to advertising revenue, particularly in view of our decision to require origination as a condition for carriage of broadcast signals on larger systems.

216 *Federal Communications Commission Reports*

work operations. A broad subscriber base might enable the production and distribution of programing financed solely through subscriber fees. Indeed, CATV systems originating locally in this manner may find some competitive advantage in attracting viewers, particularly in the Nation's larger cities. See *Midwest Television, Inc.*, 13 F.C.C. 2d 478, 506, footnote 29. CATV operators are, of course, free to originate without commercials if they choose to do so and to experiment in this area. While we believe that the subscribing public should not be required to pay extra fees in order to obtain access to local public service programing or presentations by political candidates on the CATV's origination channel, we do not presently contemplate any prohibition against higher monthly fees or per program charges for other minority interest programing, or special charges for other extra services (e.g., burglar alarm and fire detection systems, etc.). In short, here again is an area requiring further study and possible future action only in the light of such study and experience.

34. The potential impact of CATV advertising on television and radio stations in small markets, and on new independent stations in large markets, is also pertinent. The notice specifically requested the parties to address themselves to varying situations in light of the local broadcast media, and sought information as to the nature and effect of existing advertising by CATV systems, including the rates charged and the kinds of advertisers attracted. While many of the comments on behalf of broadcast interests seek a prohibition against commercials on adverse impact grounds, their assertions are phrased in general terms and do not provide specific information or address varying situations. However, a few of the CATV comments do contain some information as to existing rates.

35. Chillicothe Telcom, Inc., which competes for advertising with two local radio stations and a newspaper, charges \$3 per spot, the same rate as the radio stations. Winchester TV Cable, Inc., has a \$50 hourly rate, and finds that sometimes advertisers will purchase time only if its commonly owned AM station, with its larger coverage, is included in the package. TeleMation asserts that the cost of CATV advertising generally ranges between 35 and 200 percent of the local AM radio rate. It appends what it regards as the fairly typical rate card of a system with fewer than 1,500 subscribers in Neosho, Mo. (population 7,452), which reflects the following:

Movie schedule sponsorship:

During periods available (when no local origination or educational channel broadcasts) exclusive sponsorship of the channel 9 (origination) movie schedule: \$100 monthly.

Profile sponsorship (Monday through Friday schedule):

Local news, 4 minutes	\$100 monthly.
Local sports, 4 minutes	Do.
Local weather, 4 minutes	Do.
Local featurette, 4 minutes	Do.
Editorial, 4 minutes	Do.
1-minute announcement	Do.
15-minute, 1 time specials	\$50 each.
30-minute, 1 time specials	\$100 each.

College basketball:

Away from home games (14 games, November through March, participation with other sponsors) \$60 monthly.

24 Hour weather channel service:

Trademark or name on any 1 instrument.....	\$25 monthly.
1 slide on Carrocel.....	\$15 monthly.
2 slides on Carrocel.....	\$25 monthly.
4 slides on Carrocel.....	\$40 monthly.
Sponsorship of weather forecast exclusively (exposure on each sweep of camera).....	\$150 monthly.
All contracts on 13-week minimum, with 10 percent discount for 12-month contracts.	

TeleMation further states that the advertising rates vary from system to system, and by way of illustration attaches the rate cards of systems in Peru, Ill., and Gallup, N. Mex.²¹

36. While advertising rates vary considerably among television and radio stations, it appears to us that existing CATV rates are much more analogous to typical radio rates than they are to those of television stations generally, or UHF independents in particular. It would seem to follow that CATV advertising on comparatively small systems poses a greater possibility of adverse impact on the revenues of radio stations than on those of television stations. This situation obviously could change with the advent of larger systems in larger communities. For the present, we do not think that there is any threat to broadcast service to the public of sufficient immediacy to warrant a general prohibition on CATV advertising, or to outweigh the considerations discussed above (par. 31; see also our action below limiting such CATV advertising to natural breaks). However, we will examine documented claims of imminent adverse impact on the public's free broadcast service on a case-by-case basis, and take such action as may be warranted.

37. In paragraph 17 of the notice the Commission requested comment on the alternative of permitting CATV advertising only at nat-

²¹ The Peru rate card is as follows:

		Per week				
		1	5	10	20	50
Announcements:						
Class I (5 p.m. to 12 p.m.).....	60 sec.....	\$12.00	\$9.60	\$8.40	\$7.80	\$7.20
	30 sec.....	9.00	7.20	6.30	5.85	5.40
	60 sec.....	9.60	7.68	6.72	6.24	5.76
	30 sec.....	7.20	5.80	5.04	4.68	4.32
		Number of times				
		1	13	26	52	
Local programming:						
Class I (5 p.m. to 12 p.m.).....	Hour.....	\$75.00	\$64.75	\$60.00	\$56.25	
	1/2 hr.....	45.00	38.25	36.00	33.75	
	1/4 hr.....	35.00	29.75	28.00	26.75	
	10 min.....	25.00	22.25	20.00	18.75	
	5 min.....	15.00	12.75	12.00	11.25	
	Hour.....	60.00	51.00	48.00	45.00	
Class II (9 a.m. to 5 p.m.).....	1/2 hr.....	36.00	31.60	28.80	27.00	
	1/4 hr.....	28.00	23.80	22.40	21.00	
	10 min.....	20.00	17.00	16.00	15.00	
	5 min.....	12.00	10.20	9.60	9.00	
	Hour.....	60.00	51.00	48.00	45.00	
	1/2 hr.....	36.00	31.60	28.80	27.00	

Note.—Costs video tape advertisement production to be charged to advertisers.
Above rates based on normal programming costs.

ural breaks without interruption of program continuity.²² TeleMa-tion states that it would not oppose reasonable regulations upon the placement of commercials. The Pennsylvania Community Antenna Television Association reports that some of its members have expressed the opinion that the so-called magazine format might be more effective than interspersing commercials throughout the program material. Individual CATV operators contemplating origination have indicated similar views to us upon occasion. Those parties opposed claim principally that the Commission has no authority to regulate the placement of commercials, and, in any event, should treat broadcasters and CATV systems alike insofar as advertising is concerned.

38. We are not persuaded by the equal treatment argument. One service depends solely on advertising revenue, whereas the other has available subscriber fees as well. Moreover, since CATV origination has its base in the carriage of broadcast signals, the Commission has both the power and the responsibility to see to it that such hybrid operations do not undercut, but rather promote, our regulatory policies in the broadcasting field, in this instance the policy of encouraging new and diversified service to the public without impairment of other existing service. We believe that a rule requiring the placement of advertising at natural breaks in CATV originated material will best further this objective and would serve the public interest, for: (1) it would permit CATV to derive additional revenue to help defray the costs of origination;²³ (2) it would provide the public with a new type of service—one where commercials did not interrupt program material at the whim of the cablecaster; (3) it would afford advertisers a new and different type of outlet in terms of size and selectivity of audience, as compared to radio and television stations and printed media; and (4) it would be less apt to affect the advertising revenue available to local broadcast services to the same degree that the alternative of unlimited CATV commercials might. We conclude that the rule adopted herein (see sec. 74.1117 in the appendix) is reasonably ancillary to the effective performance of our responsibilities for the regulation of broadcasting, and is within the Commission's statutory and constitutional authority. *United States v. Southwestern Cable Co.*, 392 U.S. 157; *Midwest Television, Inc.*, 13 F.C.C. 2d 478, 504-505; 15 F.C.C. 2d 84, 91; see also discussion, *infra*, pp. 28-32.²⁴

B. Equal time, sponsorship identification, fairness

39. In paragraphs 19-20 of the notice, the Commission proposed to adopt rules conditioning the carriage of broadcast signals by CATV

²² By natural intermissions or breaks, we mean at the beginning or end of a particular originated program, or at any intermission in the program material which is beyond the control of the cable operator; such as timeout in a sporting event, an intermission in a concert or dramatic performance, a recess in a city council meeting, or an intermission in a long motion picture which was present at the time of theatre exhibition, etc.

²³ We will consider in the further proceedings the question of whether advertising should be permitted in connection with automated services if the system does not engage in cablecasting as defined herein, and whether some different provision should be made for advertising, if any, in connection with services of this nature.

²⁴ *Grosjean v. American Press Co.*, 297 U.S. 233, and *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, upon which several parties rely, are distinguishable. A regulation as to the placement of CATV commercials, for the reasons set forth above, is not comparable to a "deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees," which the Supreme Court found bad in *Grosjean*. Nor does our regulation in any way go to the content of the commercials, or infringe upon the protection accorded to editorial advertising under the first amendment, as reflected in the *New York Times Co.* case.

systems engaged in program origination upon a requirement that such origination be conducted in accordance with the following conditions:

(a) A rule condition analogous to section 315 of the Communications Act and section 73.657 of the Commission's rules concerning broadcasts by candidates for public office;

(b) A rule condition analogous to section 317 of the Communications Act and section 73.654 of the Commission's rules concerning announcement of sponsored programs; and

(c) ~~A~~ rule condition analogous to the obligation referred to in section 315(a) of the Communications Act and the rules promulgated thereunder, to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

In view of our determination not to prohibit, but rather encourage, CATV origination, and to permit advertising, we have decided to adopt the rules set forth in the appendix with respect to equal time, fairness, and sponsorship identification. We believe that these requirements are necessary in the public interest for origination conducted in conjunction with carriage of broadcast signals. See paragraphs 40-47 below.

40. Despite some challenge to our jurisdiction to impose any requirements on CATV origination, there was general unanimity in the comments that, if origination is to be permitted, it would be desirable in the public interest for CATV to afford equal time to political candidates and reasonable opportunity for discussion of conflicting views on issues of public importance, and to identify sponsors. Most of the comments on behalf of CATV interests indicated that they would have no objection to conducting their origination in this manner, and most broadcaster comments urged that they should be required to do so, assuming Commission jurisdiction. The comments of independent entities, such as the American Civil Liberties Union and the city of New York, also were in favor of equal time and fairness requirements. We think there is no real question but that CATV origination in conjunction with the carriage of broadcast signals should comport with these cardinal policies of the Communications Act, which are so important to the American political system and an informed electorate. *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367. We shall therefore turn to the basis for our conclusion that we have jurisdiction to adopt the appended rules, which provide that no CATV system shall carry any broadcasting signal if the system engages in cablecasting unless such cablecasting is conducted in accordance with equal time, fairness, and sponsorship identification requirements patterned after those applicable to broadcasters.²⁵

41. The contention that the Commission lacks authority under the Communications Act and the first amendment to condition CATV's carriage of broadcast signals upon reasonable regulations going to CATV program origination, was rejected in *Midwest Television, Inc.*, 13 F.C.C. 2d 478, 504-505, and in our opinion denying recon-

²⁵ The rules adopted herein are in some respects simpler than those governing broadcasters. Should they prove inadequate, the Commission can, of course, take appropriate rulemaking action to modify or supplement these rules in light of experience.

sideration, 15 F.C.C. 2d 84, 91, on grounds which are equally pertinent here. Moreover, the rules set forth in the appendix hereto come within the jurisdictional standard set forth by the Supreme Court in the *Southwestern* case supra. It is clearly necessary to the effective performance of our responsibilities for the regulation of television broadcasting that we require CATV systems engaged in program origination to abide by the same equal time and fairness requirements applicable to broadcasters. The Commission's responsibility for carrying out the provisions of section 315 of the Communications Act (sec. 315(c)) would be largely thwarted if unequal opportunities were afforded on CATV origination channels. For example, the CATV subscriber might tune his television set to channel 2, a broadcast channel granting equal time to candidates A and B, and then switch to channel 3, a CATV origination channel presenting only candidate A. Conceivably, the broadcaster might afford candidates A and B one-half hour each, on 1 day on channel 2, and the CATV operator might present only candidate A for several hours for a number of days on channel 3. Or, following the one-half hour appearances of candidates A and B on broadcast channel 2, the CATV operator might present only candidate A for the next 3 hours on the same channel in place of broadcast program material deleted pursuant to the Commission's nonduplication rules (sec. 74.1103 (e) and (f)). See footnote 26 of the *Midwest* decision, supra.

42. Similarly, the requirement that broadcasters present both sides of controversial issues of public importance—an obligation inherent in the public interest standard and properly imposed on broadcasters by the Commission to implement congressional policy (*Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367, 379-386), would be grossly circumvented if the CATV subscriber receives both sides when he tunes his television set to a broadcast channel at a time when broadcast program material is being presented but only one side when he switches to a CATV origination channel or stays tuned to the broadcast channel at a time when CATV origination has been substituted for deleted broadcast material.

43. We think that similar considerations necessitate CATV compliance with the legislative policy reflected in section 317 of the Communications Act, which recognizes that sponsorship identification is essential to an informed public. Here, again, our rules requiring such announcements by broadcasters would be substantially undercut if CATV originated material presented in conjunction with broadcast signals failed to reveal that the CATV operator had received money, service or other valuable consideration for presenting such material (e.g., a controversial issue program without divulgence of the entity seeking to persuade the public).

44. We could not, consistent with our statutory responsibilities, permit a CATV operator to place broadcast signals in a setting of inequality, unfairness, and hidden sponsorship which would destroy the signals' integrity and defeat the purposes of the obligations imposed on broadcasters in the public interest.²⁶ Our statutory authority over

²⁶ We wish to make clear that we do not impute such undesirable practices to the cable industry. Indeed, to the best of our knowledge, the systems which originate programming have attempted to treat political candidates and controversial issues fairly.

interstate communication by wire or radio necessarily encompasses power to prohibit CATV systems from carrying broadcast signals in conjunction with CATV origination that does not afford equal time to political candidates or present both sides of controversial issues of public importance or reveal program sponsorship. The CATV operator may conduct his origination in such fashion if he chooses to do so on a system carrying no broadcast signals. But we cannot permit the carriage of broadcast signals under circumstances so patently contrary to the public interest. We conclude that statutory authority for adoption of the rules in the appendix hereto is contained in sections 2, 3, 4(i), 301, 303, 307, 308, 309, 315, and 317 of the Communications Act. Cf. *Wrather-Alvarez Broadcasting, Inc. v. Federal Communications Commission*, 248 F.2d 646 (C.A.D.C., 1957).

45. We believe that for the reasons developed (*supra*, pars. 41-44) our action in this respect is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (*United States v. Southwestern Cable Co.*, *supra*, at p. 178). We would also note that *Southwestern* emphasized the breadth of the Commission's regulatory power:

The Act's provisions are explicitly applicable to "all interstate and foreign communication by wire or radio * * *." 47 U.S.C. § 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to "make available * * * to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service * * *." 47 U.S.C. § 151. The Commission was expected to serve as the "single Government agency" with "unified jurisdiction" and "regulatory authority over all forms of electrical communication, whether by telephone, telegraph, cable, or radio." It was for this purpose given "broad authority." As this Court emphasized in an earlier case, the Act's terms, purposes and history all indicate that Congress "formulated a unified and comprehensive regulatory system for the industry." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137. (Footnotes omitted.) *Id.* 167-168.

Elsewhere the decision states (*id.* 172-173):

Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wishes "to maintain, through appropriate administrative control a grip on the dynamic aspects of radio transmission" *F.C.C. v. Pottsville Broadcasting Co.*, *supra*, 309 U.S. at 138, 60 S. Ct. at 439, that it conferred upon the Commission a "unified jurisdiction" and "broad authority." Thus "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *F.C.C. v. Pottsville Broadcasting Co.*, *supra*, at 138. Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219. We have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over "all interstate * * * communication by wire or radio." (Footnotes omitted.)

46. Assuming statutory authority, we think that the claim of first amendment abridgment is clearly without merit. As stated in *Midwest*, *supra*, no one has a first amendment right to provide broadcast signals to the public in a manner contrary to the public interest (15

F.C.C. 2d at 91). Nor does the circumstance that CATV program origination may be economically dependent upon carriage of broadcast signals give rise to an indirect infringement of first amendment rights. Since CATV systems use broadcast signals as the backbone of the service they provide, they come within the regulation of this agency, if reasonably related to the public interest. If the regulation is so related, it is not barred by the first amendment (see above discussion; *NBC v. U.S.*, 319 U.S. 190).²⁷ The above regulations are clearly reasonably related to the public interest. Far from being inconsistent with the first amendment—which is of course one of the most crucial aspects of the public interest—the regulations promote the purposes of the first amendment. As the Supreme Court stated in *Red Lion*, supra, 395 U.S. at 390:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

47. In holding that the equal time and fairness requirements on broadcasters are consistent with the purposes of the first amendment the Court gave reasons which also seem equally applicable to origination by a CATV operator (395 U.S. at 392):

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personnel attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. [Footnote omitted.] Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press v. U.S.*, 326 U.S. 1, 20 (1944).

We see no indirect infringement of first amendment rights in the rules adopted herein.

CONCLUSION

48. In light of the foregoing, we conclude that the public interest would be served by adoption of the rules set forth in the appendix hereto, effective 30 days from publication of this order in the Federal

²⁷ It is thus immaterial that the scarcity of frequencies rationale underlying first amendment rulings in the broadcast field does not apply directly to the cable technology. In view of the above analysis, it is also unnecessary to reach the question of economic scarcity (see *Red Lion*, supra, 395 U.S. at footnote 28). We do note the CATV operator's monopoly control over cable channels of communication to the home—i.e., that cable television's operations have developed on a noncompetitive, monopolistic basis in the particular areas served, with no instance, to our knowledge, where a member of the public subscribes to more than one cable television service.

Register. Upon such entry in force, we point out that State or local regulations or conditions inconsistent with these Federal regulatory policies are, we believe, preempted. See *Head v. New Mexico*, 374 U.S. 424 (1963).²⁸ Authority for such rules are contained in sections 2, 3, 4 (i) and (j), 301, 303, 307, 308, 309, 315, and 317 of the Communications Act. We further conclude that a final determination on the other aspects of the proposed rulemaking discussed herein should be the subject of a further report and order.

49. Accordingly, *It is ordered*, That the rules set forth in the appendix hereto *Are adopted*, effective December 1, 1969, and the Commission retains full jurisdiction over all other aspects of this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE, *Secretary*.

APPENDIX

Part 74, subpart K, is amended as follows:

1. In section 74.1101, new paragraphs (j) and (k) are added as follows:

§ 74.1101 Definitions.

(j) *Cablecasting*. The term "cablecasting" means programming distributed on a CATV system, which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system.

(k) *Legally qualified candidate*. The term "legally qualified candidate" means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who:

- (1) Has qualified for a place on the ballot, or
- (2) Is eligible under the applicable law to be voted for by sticker, by writing his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office.

2. A new section 74.1111 is added to read as follows:

§ 74.1111 Cablecasting in conjunction with carriage of broadcast signals.

(a) Effective on and after January 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.

(b) No CATV system shall carry the signal of any television broadcast station if the system engages in cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 74.1113, 74.1115, 74.1117, and 74.1119.

3. A new section 74.1113 is added to read as follows:

§ 74.1113 Cablecasts by candidates for public office.

(a) *General requirements*. If a CATV system shall permit any legally qualified candidate for public office to use its cablecasting facilities, it shall afford equal opportunities to all other such candidates for that office to use such facilities: *Provided*, That such system shall have no power of censorship over the material

²⁸ Compare para. 21-22, 26 of the Dec. 18 notice herein. In other words, we think that States and localities should remain free to impose additional affirmative obligations on CATV systems, so long as they refrain from imposing restrictions which are inconsistent with the Federal regulatory policies.

cablecast by any such candidate; And provided further, That an appearance by a legally qualified candidate on any:

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of the facilities of the system within the meaning of this paragraph.

NOTE.—The fairness doctrine is applicable to these exempt categories. See § 74.1115.

(b) *Rates and practices.*

(1) The rates, if any, charged all such candidates for the same office shall be uniform, shall not be rebated by any means direct or indirect, and shall not exceed the charges made for comparable use of such facilities for other purposes.

(2) In making facilities available to candidates for public office no CATV system shall make any discrimination between candidates in charges, practices, regulations, facilities, or services for or in connection with the service rendered, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any CATV system make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office.

(c) *Records, inspections.* Every CATV system shall keep and permit public inspection of a complete record of all requests for cablecasting time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the system of such requests, and the charges made, if any, if the request is granted. Such records shall be retained for a period of two years.

(d) *Time of request.* A request for equal opportunities must be submitted to the CATV system within one week of the day on which the prior use occurred.

(e) *Burden of proof.* A candidate requesting such equal opportunities of the CATV system, or complaining of noncompliance to the Commission, shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office.

4. A new section 74.1115 is added to read as follows:

§ 74.1115. *Fairness Doctrine; Personal attacks; Political editorials.*

(a) A CATV system engaging in cablecasting shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

NOTE.—See Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10418.

(b) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the CATV system shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the cablecast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the system's facilities.

(c) The provisions of paragraph (b) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (b) of this section shall be applicable to editorials of the licensee).

(d) Where a CATV system, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the system shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (a) notification of the date, time, and channel of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the system's facilities; *Provided, however,* That where such editorials are cablecast within 72 hours prior to the day of the election, the system shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

5. A new section 74.1117 is added to read as follows:

§ 74.1117 Advertising.

A CATV system engaged in cablecasting may present advertising material at the beginning and conclusion of each cablecast program and at natural intermissions or breaks within a cablecast, *Provided* That the system itself does not interrupt the presentation of program material in order to intersperse advertising; *And provided, further,* That advertising material is not presented on or in connection with cablecasting in any other manner.

Note.—The term "natural intermissions or breaks within a cablecast" means any natural intermission in the program material which is beyond the control of the CATV operator, such as time-out in a sporting event, an intermission in a concert or dramatic performance, a recess in a city council meeting, an intermission in a long motion picture which was present at the time of theatre exhibition, etc.

6. A new section 74.1119 is added to read as follows:

§ 74.1119 Sponsorship identification.

(a) When a CATV system engaged in cablecasting presents any matter for which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, such system, the system shall make an announcement that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied; *Provided, however,* That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a cablecast unless it is so furnished for consideration for an identification in a cablecast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the cablecast.

(b) Each system engaged in cablecasting shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program matter for cablecasting, information to enable it to make the announcement required by this section.

(c) In the case of any political program or any program involving the discussion of public controversial issues for which any films, records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a CATV system as an inducement to the cablecasting of such program, an announcement to this effect shall be made at the beginning and conclusion of such program; *Provided, however,* That only one such announcement need be made in the case of any such program of 5 minutes' duration or less, either at the beginning or conclusion of the program.

(d) The announcements required by this section are waived with respect to feature motion picture films produced initially and primarily for theatre exhibition.

CONCURRING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

Although the report and order herein is lengthy, the results are, simply, that any CATV

(a) may originate programs without limitation as to number of channels, and, beginning January 1, 1971, any system with 3,500 or

more subscribers is required to originate programs to a "significant extent";

(b) may sell advertising to present on natural breaks or "intermissions" only; and,

(c) must comply with the equal opportunity and fairness doctrine provisions of section 315 of the Act and sponsorship identification provisions of section 317 of the Act.

I believe that these provisions serve the public interest. However, since there are certain presumptions in the Report and Order with which I do not agree, I concur only in the result.

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

Without reaching the merits of the order adopted here, I must dissent on the grounds that the complexion of the Commission is about to change by almost one-third. Our new colleagues will be administering the important policy matters here adopted, with which they may or may not agree. If they wished, they could conceivably reverse this decision which could be awkward.

20 F.C.C. 2d

APPENDIX D

CATV

825

F.C.C. 70-677

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

AMENDMENT OF PART 74, SUBPART K, OF THE
COMMISSION'S RULES AND REGULATIONS
RELATIVE TO COMMUNITY ANTENNA TELE-
VISION SYSTEMS; AND INQUIRY INTO THE
DEVELOPMENT OF COMMUNICATIONS TECH-
NOLOGY AND SERVICES TO FORMULATE REG-
ULATORY POLICY AND RULEMAKING AND/OR
LEGISLATIVE PROPOSALS

Docket No. 18397

MEMORANDUM OPINION AND ORDER

(Adopted June 24, 1970; Released July 1, 1970)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON CON-
CURRING IN PART AND DISSENTING IN PART AND ISSUING STATEMENTS;
COMMISSIONERS COX AND WELLS CONCURRING IN THE RESULT.

1. We have before us a number of petitions for reconsideration of our First Report and Order herein, released October 27, 1969, 20 FCC 2d 201, 34 F.R. 17651. In that decision, following a Notice of Proposed Rule Making and Notice of Inquiry of December 13, 1968 (15 FCC 2d 417, 33 F.R. 19028), we dealt with certain aspects of community antenna television (CATV) service. We determined that the public interest would be served by program origination (cablecasting) over CATV systems, and accordingly adopted a requirement for such cablecasting after January 1, 1971 by systems with 3,500 or more subscribers, leaving to further proceedings the question of whether the requirement should be made applicable to smaller systems. We also authorized advertising on cablecasts, limited to the beginning and end of each program, and to such "natural breaks or intermissions" within programs as are beyond the control of the CATV operator. We also made applicable to cablecasting requirements similar to those of Sections 315 and 317 of the Communications Act with respect to equal opportunities for political candidates, fairness in the treatment of controversial issues of public importance, and sponsorship identification. Other issues raised by the December 13, 1968 Notice (e.g., diversification of control, common carrier operations by CATVs, importation of distant signals) were left for subsequent resolution.

2. The joint petition for reconsideration of Cablecom-General, Inc., Communications Properties, Inc., Pennsylvania Community Antenna Television Association, Inc., Service Electric Company and Texas CATV Association, Inc. supports the Commission's objectives of pro-

moting multi-purpose CATV operation combining the carriage of broadcast signals, program origination and common carrier services. However, it urges that a compulsory origination requirement, limitations upon advertising, and the possibility of a dual Federal-State regulatory system are undesirable. With respect to the origination, or "cablecasting," requirement, it is urged that to compel cablecasting by systems not adequately prepared to undertake it will not advance the Commission's aims, but rather will retard their realization. The petition urges that there is no valid basis for assuming that CATV systems not now originating programs do not have a valid reason for failing to do so; uncertainties over copyright legislation and state public utility regulation as well as economic problems related to capital requirements are referred to as possible obstacles to effective cablecasting. To force unprepared systems to undertake cablecasting, it is said, will result only in poor service and the discouragement (because of fear of future unknown requirements) of cablecasting by others who might otherwise undertake it voluntarily. The pleading states that a sound judgment in this area requires further study of the costs of program origination, and that substantial outlays should not be required in the face of so many uncertainties, including the Commission's own statement that unforeseen impact upon television broadcast service would be remedied in some unspecified manner. In sum, it is urged that the industry is making substantial strides in this area upon a voluntary basis, and that this situation should not be disturbed.¹

3. We have carefully considered these contentions, but are not persuaded that either the public or the CATV industry would be better served by deleting the cablecasting requirement. As the petitioners state, there is no disagreement about the value and importance of cablecasting. Since many systems are now originating, the general feasibility of origination is no longer in doubt, and we believe that we adopted a reasonable cut-off point in limiting the applicability of our rule to systems with at least 3,500 subscribers. The First Report and Order covers this issue in detail,² including available data on costs, and the initial rule adopted in that document is very broad, permitting great flexibility in cablecasting operations. We have been given no data tending to demonstrate that systems with 3500 subscribers cannot cablecast without impairing their financial stability, raising rates or reducing the quality of service. We recognize that there are some uncertainties, but these uncertainties have not prevented the inauguration of cablecasting by many systems.³ Innovative arrangements are also possible, such as agreements with educational institutions under which a channel is made available for the use of the school which, with its own studio and other facilities, will produce educational, cultural

¹ The petition is supported by a resolution adopted by The Pennsylvania Community Antenna Television Association, Inc. making the same points, and stating particularly that if cablecasting is not self-supporting, subscribers must either face increased charges or poorer service.

² It points out that 70% of the systems now originating have fewer than 3500 subscribers.

³ We may note particularly in this regard that we see no substantial threat to television broadcast service warranting Commission action in the foreseeable future, particularly since cablecasting would be of programs bought or produced in the open market. In any event, voluntary cablecasting would of course be subject to the same caveat of possible remedial action if television service were threatened in a respect inimical to the public interest.

and other programing. The CATV of course would be expected to see to it that local political and other affairs are covered on that or a different channel, but the costs of origination to it would be sharply reduced. We do not see, therefore, why a reasonable requirement for cablecasting should produce less quality origination than would otherwise be produced.⁴ The rule adopted is minimal in the light of the potentials of cablecasting and, on our own motion, we are postponing the date when originations must commence to April 1, 1971, to afford additional preparation time.

4. Indeed, we recognize that there is a question of whether we should not go beyond the minimal rule and specify a minimum number of hours for local live origination (as against presenting primarily film). We adhere to the judgment, set out in par. 30 of the First Report—namely, that it is appropriate to afford a period of free experimentation and innovation by cable operators. However, there is one development which does require consideration. It has come to our attention that some cable operators simply lease their origination channel to a local radio station, which in turn presents its disc jockey shows over this channel for virtually the entire broadcast day. While the cable operator is perfectly free to enter into arrangements with local broadcast stations during the period of experimentation (subject of course to whatever limitations are adopted with respect to cross-ownership in this field—see Notice, par. 23, 33 F.R. 18977, 19032-33), the main purpose is to provide an outlet for local expression. As we stated in the First Report, the very existence of “available facilities for local production and presentation of programs . . .” (74.1111(a)) is a most important contribution to the public interest, since it means that the mayor, the local political candidates, those willing to discuss controversial issues, etc., have a means of access to the television viewer. However, if the channel is unavailable for such presentation because it is leased out to a local broadcast facility for television presentation of its shows, the above purpose is frustrated. We therefore have amended 74.1111(a) to make clear that the CATV may not enter into any arrangement which inhibits or prevents the substantial use of the cable facilities for local programing designed to inform the public on issues of public importance.

5. Finally, Cablecom-General *et al.* urge that we conduct further rule making before requiring common carrier service by CATV's, and that we act to end the possibility of confusing dual State-Federal regulation. Both of these subjects require further exploration beyond the bounds of our First Report and Order of October 27, 1969, and cannot appropriately be dealt with here.

6. Several parties⁵ urge that the Commission, in encouraging cablecasting, has embarked upon a new course with respect to CATV, which was previously limited to the role of a supplement to broadcast television service. They say that CATV, still founded upon the carriage

⁴ There is always the possibility of waiver in a particular case, but we stress that it will be granted only because of unusual circumstances.

⁵ E.g., American Broadcasting Company, Association of Maximum Service Telecasters, a group of television stations (WAVE-TV *et al.*), the National Association of Broadcasters, and the All-Channel Television Society. ABC also urges full licensing of CATV, and a re-examination of policies on the carriage of non-local broadcast signals, matters beyond the scope of the First Report and Order of October 27, 1969.

of broadcast signals, but now encouraged to originate programs independently, will be a greater threat to the public's continued reception of "free" programs than either previous CATV operations or subscription television broadcasting. The latter, they point out, has been channelled so as to give the public something different from what it receives on free TV and to avoid siphoning the present free programming fare. We agree that where cablecasting is accompanied by a per-program or per-channel fee, it is akin to subscription television and presents the same threat of siphoning programs away from free television * in favor of a service limited to those who can pay and, in the case of cablecasting, to those to whom the cable is geographically available. Remedial action in this area should not wait upon the threat becoming actuality. As was the case with subscription television, protection of the public requires that action be taken at a time when it involves no disruption of existing patterns. The adoption of rules similar to those preventing siphoning television programs from free television broadcasting to subscription television broadcasting will serve to insure that cablecasting does not merely force the public to pay for what it now receives free. They are additionally warranted here because of CATV's inability to serve the same audience reached by a television broadcast station, and they serve the same purpose of protecting those who do not wish, or cannot afford, to pay for television. Finally, we believe that as is the case with subscription television, advertising should not be permitted where the public pays directly for the programs. This additional economic support should not be necessary, and it would be contrary to the public interest. Appendix A hereto adds a new Section 74.1121 to our rules to accomplish these purposes. However, we do not believe that cablecasting unaccompanied by per-program or per-channel charges presents a substantial threat of siphoning, or that such cablecasting, which we wish to stimulate, should be restricted to one channel or limited to sponsorship by local advertisers in small communities. The basis for this judgment is that when CATV operates in its present fashion (i.e., a flat charge in a generally well-defined range), it poses no significant threat of siphoning programming from the regular television system, and thus, adoption of the pay-TV restrictions to ordinary cablecasting services would inhibit the development of such services, without any present basis or need for the inhibition. The Commission will of course be prepared to take remedial action if in the future charges for programs should be hidden in increased general subscriber charges. At the present time, however, we see no warrant for

* MST has shown that cable systems have plans to carry feature films, and sports such as hockey and basketball. Furthermore, the potential revenue from cablecasting accompanied by per-program or per-channel charges is substantial. With such charges, potential revenues are adequate to make siphoning a real possibility. Thus, as MST points out, with 10 million subscribers in the United States, an average of \$2 per month per home would generate revenues of \$240 million per year, enough to remove all professional sports from free TV. Slightly higher charges would give the same revenue with many fewer subscribers. Siphoning in particular areas would also be a problem. It is pointed out, for example by WAVE-TV et al., that with 600,000 subscribers in the Philadelphia area (less than 30% penetration), a CATV system receiving an average of \$7.50 per month per subscriber in fees plus per-program charges would have revenues above those of all the Philadelphia market television stations combined. We also note the affidavit of John A. Dimling, Jr., submitted by the NAB on the siphoning question.

* WAVE et al. propose more severe restrictions, such as a prohibition of any cablecast of live professional sports events or any recorded cablecast of these events within one week of their occurrence, and a prohibition of non-local variety programs. We believe these additional restrictions, at least without more experience, are too stifling.

placing upon ordinary cablecasting the restrictions appropriate to pay-TV operations. We stress that should we be mistaken in this regard and experience show the need for corrective action, we shall take such action at the first indication of the need therefor.

7. We note also other requests by several parties that we deal with CATV on a more comprehensive basis at this time, covering such issues as licensing, whether origination by the CATV operator should be permitted on more than one channel, regulation of common carrier operations, reporting requirements, and technical standards. We are not persuaded that all of these questions need be resolved before we proceed with the basic determinations made in the First Report and Order of October 27, 1969. CATV originations are still in their infancy and, so far as we know, common carrier operations are still in the future. These various issues are not being forgotten. Some are being acted on at this time; the others are beyond the necessary scope of this part of Docket No. 18397 and are matters we do not feel in a position to resolve at this time.* One further matter raised in the Notice of Proposed Rulemaking of December 13, 1968 should be dealt with at this time in view of indications that problems may now be arising, and that is the prohibition of lotteries. We are adopting a new Section 74.1116 to meet this problem.

8. The American Newspaper Publishers Association has urged that we add a new section to make clear that our requirements as to equal time for political candidates, the fairness doctrine, political editorials and personal attacks, advertising, and sponsorship identification requirements are not applicable to the dissemination of newspapers. We agree with the thrust of this petition that we did not intend to apply these requirements to the distribution of printed newspapers to their subscribers by way of cable. It does not appear necessary to amend the rule to make this clear. This opinion will constitute the Commission's definitive interpretation of the rules adopted in the October 27, 1969 Report and Order in this respect. However, we should also make clear that ordinary cablecasting is covered by the rules. It makes no difference on this question that a newspaper is the originator of the program any more than it would if a newspaper sponsored a program on a broadcast station. A news or public affairs program on a broadcast station owned by a newspaper is not exempt from fairness, sponsor identification and other requirements. The point is that we have no intention of regulating the print medium when it is distributed in facsimile by cable, but we do hold that the publication of a newspaper by a party does not put it in a different position from other persons when it sponsors or arranges

* The National Association of Educational Broadcasters has repeated a previous proposal with respect to priorities of service to be required of CATV systems, i.e., television signals required to be carried by our rules. State or local requirements, public service use in conjunction with educational agencies, common carrier service. Such requirements can best be considered in the context of some of the issues mentioned above. Its further suggestion that we adopt standards to require that cablecasters coordinate educational and public service programming with affected educational organizations is, we believe, unnecessary in the absence of further experience with the new medium. We have no reason to think that educational organizations will not be consulted or, on another aspect of this general question, that commercial continuity will be inappropriately used in connection with educational programs. Every conceivable problem, even if of potential importance, cannot be dealt with in advance of some experience indicating its substantiality and the best approach to it.

for the presentation of a CATV origination which does not constitute the distribution of its newspaper.²

9. Accordingly, upon the authority of Sections 2, 3, 4(i) and (j), 301, 303, 307, 308 and 309 of the Communications Act, the rules set forth in Appendix A hereto *Are adopted*, effective August 14, 1970, and

It is further ordered, That the petitions for reconsideration are in all other respects *Denied*.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX A

I. Section 74.1111(a) is revised to read:

§ 74.1111 *Cablecasting in conjunction with carriage of broadcast signals.*

(a) Effective on and after April 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services; *Provided, further*, That the system shall not enter into any contract, arrangement or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including the time period 6:00-11:00 p.m.), for local programming designed to inform the public on controversial issues of public importance.

II. A new Section 74.1116 is added to read as follows:

§ 74.1116 *Lotteries.*

(a) No CATV system when engaged in cablecasting shall transmit or permit to be transmitted on the cablecasting channel or channels any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

(b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or chance, if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program broadcast on the station in question.

III. A new Section 74.1121 is added to read as follows:

§ 74.1121 *General operating requirements.*

(a) Cablecasting operations for which a per-program or per-channel charge is made shall comply with the following requirements:

(1) Feature films shall not be cablecast which have had general release in theaters anywhere in the United States more than 2 years prior to their cablecast: *Provided, however*, That during one week of each calendar month one feature film the general release of which occurred more than ten years previously may be cablecast, and more than a single showing of such a film may be made during that

² W note, of course, that our First Report and Order did not deal with common carrier services provided by a CATV. This subject calls for further independent study. We also note that the rules adopted in the First Report and Order, as they state, apply to programs originated by others than the CATV operator, when presented on the channel or channels controlled by the CATV operator.

week: *Provided, further, That* feature films the general release of which occurred between two and ten years before proposed cablecast may be cablecast upon a convincing showing to the Commission that a bona fide attempt has been made to sell the films for conventional television broadcasting and that they have been refused, or that the owner of the broadcast rights to the films will not permit them to be televised on conventional television because he has been unable to work out satisfactory arrangements concerning editing for presentation thereon, or perhaps because he intends never to show them on conventional television since to do so might impair their repetitive box office potential in the future.

Note: As used in this subparagraph, "general release" means the first-run showing of a feature film in a theater or theaters in an area; on a nonreserved-seat basis, with continuous performances. For first-run showing of feature films on a nonreserved-seat basis which are not considered to be "general release" for purposes of this subparagraph, see note 56 in the Fourth Report and Order in Docket No. 11279, 15 FCC 2d 466.

(2) Sports events shall not be cablecast which have been televised live on a nonsubscription, regular basis in the community during the two years preceding their proposed cablecast: *Provided, however, That* if the last regular occurrence of a specific event (e.g., summer Olympic games) was more than two years before proposed showing on CATV in a community, and the event was at that time televised on conventional television in that community, it shall not be cablecast.

Note 1: In determining whether a sports event has been televised in a community on a nonsubscription basis, only commercial television broadcast stations which place a Grade A contour over the entire community will be considered. Such stations need not necessarily be licensed to serve that community.

Note 2: The manner in which this subparagraph will be administered and in which "sports," "sports events," and "televised live on a nonsubscription regular basis" will be construed is explained in paragraphs 288-305 of the Fourth Report and Order in Docket No. 11279, 15 FCC 2d 466.

(3) No series type of program with interconnected plot or substantially the same cast of principal characters shall be cablecast.

(4) Not more than 90 percent of the total cablecast programming hours shall consist of feature films and sports events combined. The percentage calculations may be made on a yearly basis, but, absent a showing of good cause, the percentage of such programming hours may not exceed 95 percent of the total cablecast programming hours in any calendar month.

(5) No commercial advertising announcements shall be carried on such channels during such operations except, before and after such programs, for promotion of other programs for which a per-program or per-channel charge is made.

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY CONCURRING IN PART AND DISSENTING IN PART

I concur in denying reconsideration of the First Report and Order's provisions for program origination, advertising, and applicability of Sections 315 and 317 of the Communications Act. However, I would apply the program origination requirement to systems with over 7,500 subscribers instead of 3,500.

I dissent to adoption of Section 74.1121, with its restrictions on programming provided at special fees, which amounts to complete strangulation of a potentially new economic base for program origination.

SEPARATE OPINION OF COMMISSIONER NICHOLAS JOHNSON CONCURRING IN PART, DISSENTING IN PART

I concur with the Commission majority's denial of the petitions for reconsideration of our action in the First Report and Order of this docket. However, I dissent to the restrictions placed on the program-

832 *Federal Communications Commission Reports*

ning to be originated by cable systems. The majority treats "pay" channels on cable systems in an identical fashion to over-the-air subscription television stations. Similar restrictions are placed on both.

In my opinion, the future of cable television lies in the efforts to originate new and unique programming—aimed at local communities, ethnic groups, and minority tastes of all kinds. Distant signals, automated services, and all the technical gimmicks promised by cable are secondary to the providing of greater diversity in programming. Cable systems have much to learn about origination; the owners, and those who program over their facilities on a leased basis, should be free to experiment with different forms of financing programming. Therefore, I would not place restrictions on this emerging industry at this time. If problems similar to those some feel are posed by over-the-air subscription television appear in cable television at some future time, I will be ready to take action then. But for now, I would prefer to let the industry develop independent of such arbitrary government controls as these.

23 F.C.C. 2d

APPENDIX E

778

Federal Communications Commission Reports

F.C.C. 71-78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
 AMENDMENT OF PART 74, SUBPART K, OF THE
 COMMISSION'S RULES AND REGULATIONS REL-
 ATIVE TO COMMUNITY ANTENNA TELEVISION
 SYSTEMS; AND INQUIRY INTO THE DEVELOP-
 MENT OF COMMUNICATIONS TECHNOLOGY AND
 SERVICES TO FORMULATE REGULATORY POL-
 ICY AND RULEMAKING AND/OR LEGISLATIVE
 PROPOSALS

Docket No. 18397

MEMORANDUM OPINION AND ORDER

(Adopted January 21, 1971; Released January 25, 1971)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COM-
 MISSIONER HOUSER NOT PARTICIPATING.

1. In the *First Report and Order in Docket No. 18397*, FCC 69-1170, 20 FCC 2d 201, the Commission adopted Section 74.1111 of the Commission's Rules which required that CATV systems having 3,500 or more subscribers engage in cablecasting beginning January 1, 1971. Subsequently, the Commission acted upon petitions for reconsideration of this action in its *Memorandum Opinion and Order in Docket No. 18397*, FCC 70-677, 23 FCC 2d 825, in which, *inter alia*, it extended the effective date of Section 74.1111 of the Rules to April 1, 1971. On July 28, 1970, Midwest Video Corporation, operator of various CATV systems, filed with the United States Court of Appeals for the Eighth Circuit a petition for review of the rules adopted in Docket No. 18397. And on December 15, 1970, Midwest filed with the Commission a "Motion for Stay" of the effective date of Section 74.1111(a) of the Rules.

2. In support of its motion, Midwest argues that: (a) there is a likelihood that it will prevail on the merits of its appeal since the Commission's actions go beyond the Commission's jurisdiction as recognized in *United States v. Southwestern Cable Co.*, 392 U.S. 157

¹ Section 74.1111 of the Rules provided that,

§ 74.1111 Cablecasting in conjunction with carriage of broadcast signals.

(a) Effective on and after January 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.

(b) No CATV system shall carry the signal of any television broadcast station if the system engages in cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 74.1113, 74.1115, 74.1117 and 74.1119.

(1968), and are otherwise open to challenge; (b) that, as an operator of a number of CATV systems with more than 3,500 subscribers, it will suffer irreparable injury if the stay is not granted since its choices would be between cessation of operation and commencement of a costly service which it could not later withdraw; and (c) that there would be no injury to the public or other parties if the Commission grants the requested stay.

3. We rule on Midwest's arguments as follows: (a) the Commission's cited actions adequately detail its reasons for determining that adoption of Section 74.1111(a) of the Rules serves the public interest as well as its grounds for believing it has authority to adopt this rule; (b) this argument is framed in generalities and there has been no showing made to support the view that compliance with Section 74.1111(a) of the Rules would be an unsustainable burden. In this regard, however, we note that both the California Community Television Association and the National Cable Television Association, Inc., have requested that we inaugurate rule making to increase the minimum subscriber number from 3,500 to 10,000. In support, they submit a study dated December 7, 1970 by Comanor and Mitchell of Stanford University on *The Economic Consequences of the Proposed FCC Regulations on the CATV Industry*.² This study seems to indicate that CATV systems of 10,000 (ultimate) subscribers, assuming all the costs they would have to bear under the commercial substitution plan (i.e. copyright fee, public TV fee, program organization, etc.), would operate at a loss at least during the first four years after starting operation.³ In these projections, the capital equipment cost for program organization was taken at the \$38,000 level and the annual operating cost for program origination was estimated to be \$43,000. And such costs are appreciably higher than first projected for cablecasting. E.g., 20 FCC 2d 201, 210. While we do not consider that an adequate showing has been made to justify general change, we see no public benefit in risking injury to CATV systems in providing local origination. Accordingly, if CATV operators with fewer than 10,000 subscribers request *ad hoc* waiver of Section 74.1111(a) of the Rules, they will not be required to originate pending action on their waiver requests. Compare *Tehachapi TV Cable Co.*, FCC 67-67, 6 FCC 2d 469. Systems of more than 10,000 subscribers may also request waivers, but they will not be excused from compliance unless the Commission grants a requested waiver; (c) the cited actions in Docket No. 18397 explain the Commission's reasons for requiring cablecasting on larger CATV systems as a benefit to the public. This benefit to the public would be delayed if the requested stay is granted, and the stay would, therefore, do injury to the public's interest.

4. Waiver requests must contain sufficient information for the Commission to judge the net effect of program origination cost on the

² Filed as Attachment A to the NCTA comments in Docket 18397-A.

³ Comanor and Mitchell study, Appendix I, Run O-100.3, table 5; Comanor and Mitchell study, Appendix I, Run O-100.2, table 5; Comanor and Mitchell study, Appendix J, Run N-100.1, table 5; Comanor and Mitchell study, Appendix J, Run N-100.2, table 5; Comanor and Mitchell study, Appendix J, Run N-100.2B, table 5; Comanor and Mitchell study, Appendix J, Run N-100.3B, table 5.

ability of the CATV system to serve its subscribers. This must include at least (a) complete financial operating statements for each of the last 3 years including separate cost entries for all major expenses (such as depreciation, labor, interest, taxes, etc.) and identification of the amount included as expenses but paid to principals, (b) a description of the depreciation periods and computation method, (c) a company balance sheet as of the beginning of the 3-year period and as of the end of each of the 3 years, (d) average number of subscribers connected to the system and homes passed by the system during each of the last three years, (e) plans for future expansion of the cable miles in the franchised area, and (f) estimated capital and operating costs for program origination. The waiver request should also include any other data which appears to be relevant, but the financial showing will be heavily relied upon in determining whether the waiver application will be granted.

In view of the foregoing, the Commission has concluded that a grant of Midwest Video Corporation's "Motion for Stay" would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Motion for Stay" filed December 15, 1970, by Midwest Video Corporation in this proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX F

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,¹ and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which orig-

¹ The provisions relating to the promotion of safety of life and property was added by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, approved and effective May 20, 1937, 50 Stat. 189.

inates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.²

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio or writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both

² The words "the Philippine Islands or" preceding "the Canal Zone" are omitted on authority of Proc. No. 2695, effective July 4, 1946, 11 Fed. Reg. 7517, 60 Stat. 1352, recognizing the independence of the Philippine Islands.

such transmission and all instrumentalities, facilities, and services incidental to such transmission.

* * * * *

SEC. 4(i). The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

* * * * *

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders

of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio, or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SEC. 307(b). In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

§ 74.1101 Definitions

(j). *Cablecasting*. The term "cablecasting" means programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system.

§ 74.1111 Cablecasting in conjunction with carriage of broadcasting signals.

(a) Effective on and after April 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services: *Provided, further*, That the system shall not enter into any contract, arrangement or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including the time period 6-11 p.m.), for local programming designed to inform the public on controversial issues of public importance.

(b) No CATV system shall carry the signal of any television broadcast station if the system engages in cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 74.1113, 74.1115, 74.1117, and 74.1119.

74.1111 suspended

[§ 74.1111 suspended; *III* (68)-14]

Supreme Court, U.S.

FILED

OCT 23 1971

E. SEEVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION,

Petitioners,

vs.

MIDWEST VIDEO CORPORATION,

Respondent,

**BRIEF OF THE STATE OF ILLINOIS,
AS AMICUS CURIAE, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

WILLIAM J. SCOTT,

Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois 60601,

PETER A. FASSEAS,

Special Assistant Attorney General,

*Counsel for The State of Illinois
as Amicus Curiae.*

ROLAND S. HOMET, JR.,

Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION,

Petitioners,

vs.

MIDWEST VIDEO CORPORATION,

Respondent.

**BRIEF OF THE STATE OF ILLINOIS,
AS AMICUS CURIAE, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

INTEREST OF AMICUS CURIAE

This brief is submitted as of right under Supreme Court Rule 42 (4) for the State of Illinois as *amicus curiae* in support of the petition by the respondents below, United States of America and the Federal Communications Commission, for certiorari to the Court of Appeals for the Eighth Circuit under 28 U.S.C. Sections 1254 (1) and 2350, and Supreme Court Rule 19 (1) (b).

The State of Illinois on September 9, 1971, through its Illinois Commerce Commission asserted regulatory jurisdiction over cable television and other forms of broadband cable communications within the State. The Commission took this action after public notice and extensive

hearings requested by Governor Richard Ogilvie, to determine "the desirability of, and necessity for, and the scope and nature of, State regulation by this Commission" of the cable industry. On the basis of expert testimony and other views elicited in the course of the hearings, the Commission concluded that the provision of broadband communications services by means of present and developing cable technology is a form of "the transmission of telegraph or telephone messages within this State," within the meaning of the State statute vesting the Illinois Commerce Commission with jurisdiction to regulate public utilities. Ill. Rev. Stats., Ch. 111 $\frac{2}{3}$, Sec. 10-3 (b).

The Commission's proceedings are still continuing. It has asserted jurisdiction but deferred the adoption of specific rules and regulations until after further hearings to be held on a Notice of Inquiry and of Proposed Rule Making now being formulated by the Commission. In its *Interim Opinion and Order* issued September 9, the Commission articulated as follows the over-riding public-interest objectives it will seek to realize in the course of its further proceedings:

"(1) 'channel choice,' or the diversification of entertainment and information services available at the option of television viewers and subject to their selection, in their homes and places of business; (2) the availability to would-be subscribers of cable television service without undue delay or discrimination, and without excessive signal degradations or outages; and (3) the availability to would-be programmers and advertisers—including sources of information, news, opinion, education, entertainment, and home and business services—now excluded as a practical matter from the mass television broadcasting medium, of nondiscriminatory and legally guaranteed access to leased cable channels for the purpose of transmitting their messages. (See the Public Utilities

Act, Secs. 8, 38, 49, 50, 54.)" *Interim Opinion and Order*, p. 13.

The Commission's opportunity to pursue these objectives, and to meet the local broadband communications needs and interests of Illinois residents, will be very much affected by the disposition of the case at bar. For the Federal Communications Commission takes the position—which was rejected by the Court below—that it has plenary authority to regulate the services provided by cable television systems, whether or not such services entail the delivery of broadcast television or radio signals and regardless of adverse competitive effect on the FCC's television and radio licensees. Illinois is not located in the Eighth Judicial Circuit and so cannot rely on the contrary decision in this case by the Court of Appeals. But if that decision is not reviewed, and the issue of State versus federal jurisdiction over cable is not authoritatively resolved by this Court, Illinois in company with other States will be left at hazard to develop alternative patterns of State regulation pending some indefinite later occasion to seek clarification from this Court.

Thus the interest of Illinois as *amicus curiae* is to seek relief from the jurisdictional uncertainties highlighted by the decision below, in order to allow the administrative processes involved in establishing State regulation of broadband cable communications to go forward.

REASONS FOR GRANTING CERTIORARI

Certiorari should be granted to determine whether the Court below correctly decided that the Federal Communications Commission lacks authority under the Federal Communications Act, 47 U.S.C. §§ 151 *et seq.*, to require origination of programming by cable television systems having a specified number of subscribers, on the ground

that such a rule is not reasonably ancillary to the FCC's responsibilities in the broadcasting field.¹ The decision of the Court of Appeals is reported at 441 F. 2d 1322.

1. This is an important question of federal law that has not been, but should be, settled by this Court.

The question presented is in fact precisely the one reserved by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). In that case the Court upheld regulation of cable systems by the FCC, but only insofar as necessary to prevent frustration of explicit broadcasting objectives, such as nationwide dispersal of television station allocations and promotion of UHF channels, committed by the Congress to the Commission. The authority recognized in the Court's opinion (at 178) was expressly "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." The Court disclaimed any view as to the authority of the Commission, if any, to regulate CATV under any other circumstances or for any other purposes.

Two terms later this Court affirmed without opinion the judgment of a three-judge District Court upholding the validity of State public-utility regulation of cable systems against the claim, *inter alia*, of federal preemption. *TV Pix, Inc. v. Taylor*, 396 U.S. 536 (1970), affirming 304 F. Supp. 459 (D. Nev. 1968). The Nevada

1. Testifying before the Communications Subcommittee of the House Commerce Committee on July 22, 1971, FCC Chairman Burch stated that "this decision puts in question the extent of the Commission's jurisdiction to regulate aspects of cable that do not reach to its economic impact on broadcasting and, as a consequence, we are preparing to seek Supreme Court review of the 8th Circuit decision."

statute thus upheld was one empowering the Public Service Commission to certificate cable operators, regulate their rates, and supervise the adequacy of their services and facilities.

Now, another two terms later, this Court is presented with the occasion to reconcile the reach of those two decisions. For States like Illinois are increasingly concerning themselves with the regulation of local service offerings by cable systems, while the Federal Communications Commission has been steadily expanding its claims to regulate aspects of cable going well beyond its economic impact on broadcasting. The question reserved in *Southwestern Cable* is now ripe for decision.

2. Clarification of the jurisdictional question at issue in this case is needed by the States, the FCC, and the Congress.

At the time that the *Southwestern* case was submitted, it was possible to state that "CATV systems have been largely unregulated at the State level."² That situation has been sharply changing. Fully five States have now adopted public utility regulation of cable systems,³ and others are moving in the same direction. Last December the New York Public Service Commission, after concluding an investigation requested by Governor Nelson Rockefeller, issued a lengthy report urging that it be given regulatory jurisdiction.⁴ Legislation for that pur-

2. Brief for the United States in No. 363, O.T. 1967, p. 8.

3. Connecticut, Nevada, Rhode Island, Vermont, and Hawaii. See New York Public Service Commission Report, *infra* note 4, pp. 103-17.

4. New York Public Service Commission, Regulation of Cable Television by the State of New York (December, 1970).

pose is now pending there as well in several other states such as California, Maryland, and Oklahoma.⁵ Illinois has of course taken the first step of asserting jurisdiction under existing law, and other interested states may well follow suit.⁶

At the same time the FCC has been progressively parting company with the rationale on which it obtained this Court's approval of federal regulation in *Southwestern*. In its notice initiating the rulemaking proceedings that led to the program-origination rule at issue in this case, the FCC contended that it had authority "to prevent such [cablecasting] operations from having detrimental consequences to the public interest and to promote their development along lines likely to maximize the potential benefit to the public." The italicized language marked a departure from this Court's rationale in *Southwestern* but its significance was marked by the Commission's then-continuing recognition of strong State and local regulatory interest—over such matters as reserva-

5. National Association of Regulatory Utility Commissioners, 1971 Bulletin, No. 6, p. 8; No. 12, p. 13; No. 14, p. 9; No. 21, p. 13. New York and New Jersey last June each adopted a one-year moratorium on franchising of new cable systems, pending enactment of statewide regulatory legislation. N. Y. Laws, Ch. 419 (1971); N. J. Laws, Ch. 221 (1971).

6. This development appears to be pertinent to the practical principle enunciated in *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20 (1961), an authority relied upon by the respondents below: "... in a borderline case we must ask whether state authority can practicably regulate a given area. . . ."

7. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C. 2d 417, 422 (1968) (emphasis added).

tion of channel capacity for public and municipal originations, and channel leasing requirements and practices.⁸

Since that time the Commission has gone very much further. It has advised the Congress that, notwithstanding the Court of Appeals decision in this case, it considers that it has authority to require cable systems to employ their channel capacity to provide a diversity of Commission specified services beyond the carriage of television signals picked up from television broadcast stations.⁹ And it has acted on this understanding by proposing a variety of rules for nonbroadcast services by cable systems, as to which State and local regulation would be expressly precluded.¹⁰ If the FCC indeed has authority to go this far, realization by the Illinois Commerce Commission of its stated regulatory objectives may be severely curtailed.

But the FCC has not rested even with its current proposals. It has taken the position publicly that it has plenary power to preempt the entire field of cable regulation—including licensing of systems, rate regulation, and supervision of service deficiencies. For example, in testimony to the Senate Commerce Commission on June 15, 1971, Chairman Burch stated:

“Our thinking right now is we would not want to go in and take over the entire field. It is a question of judgment, not a question of law or the constitution. And very candidly, we could be wrong; very candid-

8. 15 F.C.C. 2d, at 425, 427.

9. Memorandum of General Counsel, FCC, submitted to the Senate Commerce Committee, June 14, 1971.

10. Letter from the Commission to the Communications Subcommittees of the House and Senate Commerce Committees, August 5, 1971, pp. 26-39, esp. 31-33.

ly, we could change our minds. If our experience is such we do not like the way it is working, we could pre-empt more of the field. That with the attendant hardship of moving into an area that a state has started dealing with."¹¹

These effects could all be brought about without the benefit of Congressional guidance. This is so because the Commission has cut itself loose from the protection of tasks committed to it in the Federal Communications Act, and their accompanying standards for decision. One is reminded of Justice Cardozo's admonitions about the Constitutional perils of such a "roving commission," without adequate Congressional delegation.¹² Short of the Constitutional issue, however, is the propriety of attributing to Congress an intent to authorize such free-lance activities when in the sections of the Act relating to specifically regulated industries the Congress was at such pains to articulate delimiting criteria.¹³

It might be thought that Congress itself could be expected to restrain the Commission from any excesses it considered unauthorized. But that would be to ignore the practicalities of the situation. Regulation of cable television is a highly controversial issue in political terms—putting the interests of cable operators, broadcasters, and copyright owners against each other (to say nothing of States, cities, and the FCC). The Commission itself has

11. Hearings before the Senate Commerce Committee, June 15, 1971, p. 191 (preliminary transcript).

12. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring).

13. See, e.g., 47 U.S.C. Secs. 303, 307, 319 (radio licensees); 201-205, 214, 220 (common carriers).

repeatedly asked the Congress for support and guidance, without avail.¹⁴ So long as the Commission can walk the tightrope of equal displeasure from all contending interest groups, the Congress is likely to continue to confine itself to an observer's role.¹⁵ Only authoritative resolution by this Court of the reach of the existing Communications Act can, as a practical matter, liberate the Congress to consider for itself what should be the appropriate division of federal and State authority over broadband cable communications.

CONCLUSION

For the reasons stated, this Court should grant certiorari to review the question of the extent of the Federal Communications Commission's presently delegated authority to regulate the nonbroadcast services of cable television systems.

Respectfully submitted,

WILLIAM J. SCOTT,

Attorney General of the State of Illinois,
160 North La Salle Street,
Chicago, Illinois 60601.

PETER A. FASSEAS,

Special Assistant Attorney General,

*Counsel for The State of Illinois
as Amicus Curiae.*

ROLAND S. HOMET, JR.,
Of Counsel.

14. See, e.g., 15 F.C.C. 2d 417, 421.

15. Cf. Brief for the United States in United States v. Southwestern Cable Co., No. 363, O.T. 1967, pp. 40-41 n. 31.

INDEX

	Page
STATEMENT	1
ARGUMENT	4
CONCLUSION	11

AUTHORITIES CITED

CASES:

<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968)	5
<i>Frost & Frost Trucking Co. v. Railroad Commission</i> , 271 U.S. 583 (1926)	6
<i>General Telephone Co. of California v. FCC</i> , 413 F. 2d 390 (D.C. Cir. 1969), cert. denied, 396 U.S. 888 (1970)	7, 8
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 157 (1968)	3, 4, 5

FCC DECISIONS:

<i>Carter Mountain Transmission Corp.</i> , 32 FCC 459 (1962), aff'd sub nom. <i>Carter Mountain Trans-</i> <i>mission Corp. v. FCC</i> , 321 F. 2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963)	3
---	---

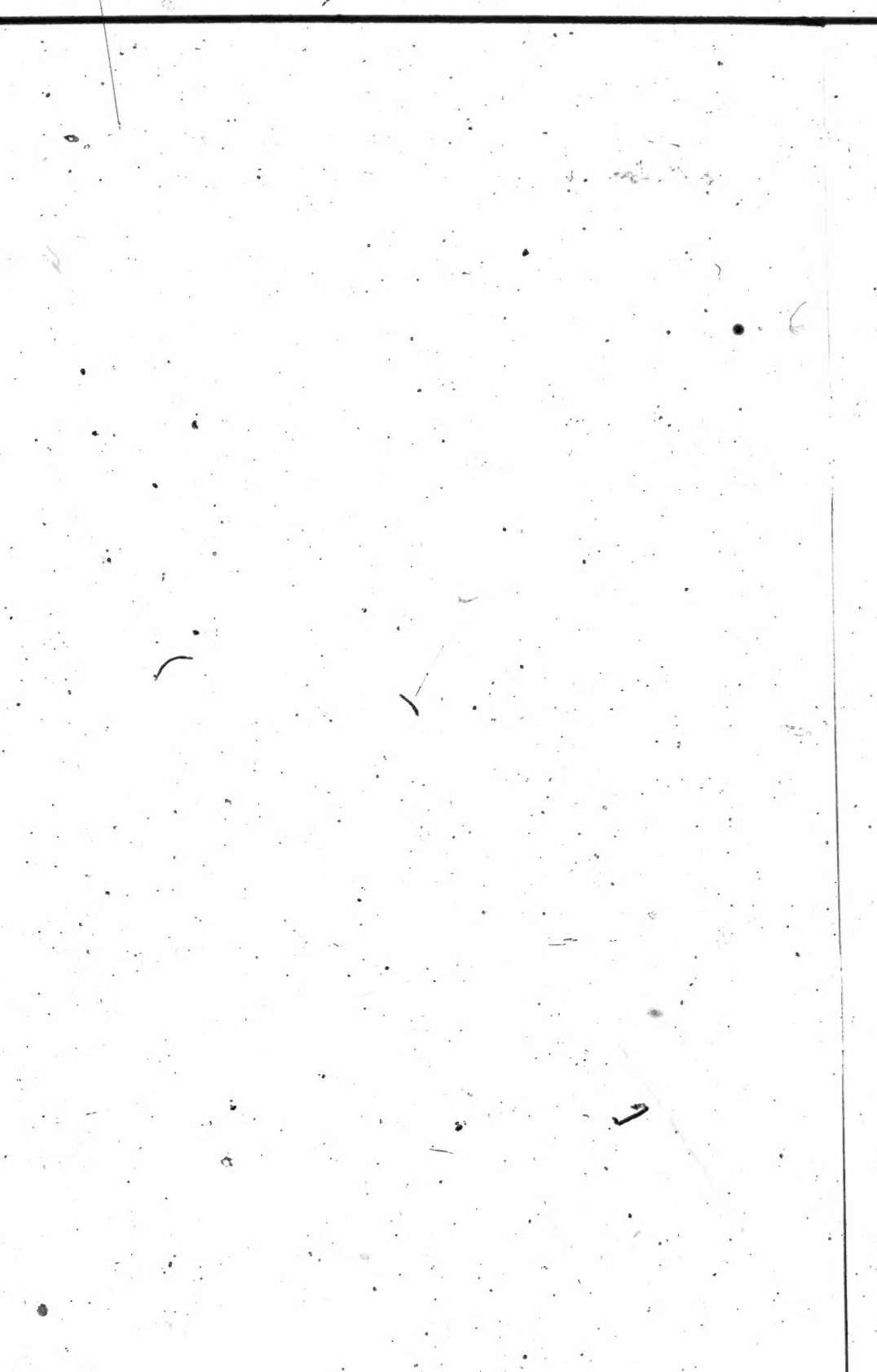
STATUTE:

Communications Act of 1934, as amended:

47 U.S.C. § 214(a)	7, 8
--------------------------	------

MISCELLANEOUS:

<i>First Report and Order</i> , 38 FCC 683 (1965)	3
<i>Inquiry into the Impact of Community Antenna Sys-</i> <i>tems, TV Translators, TV "Satellite" Stations,</i> <i>and TV "Repeaters" and the Orderly Develop-</i> <i>ment of Television Broadcasting</i> , 26 FCC 403 (1959)	2
<i>In re Commission Proposals For Regulation of Cable</i> <i>Television</i> , 31 FCC 115 (1971)	10
<i>Second Report and Order</i> , 2 FCC 2d 725 (1966)	3



IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, *Respondent.*

**OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

STATEMENT

This case involves the narrow question of whether the Federal Communications Commission ("the Commission") has the authority under the Communications Act of 1934 to compel community antenna television ("CATV") systems with 3500 or more subscribers to engage in the business of originating programs. The United States Court of Appeals for the Eighth Circuit ruled in the Opinion below (Pet. App. A) that the Commission did not have such authority.

In order to place this question in perspective, it is necessary briefly to review the history of the development of CATV regulation by the Commission.

CATV had its inception in the late 1940's when systems commenced operation as a means of providing television signals to communities where normal television reception was poor or non-existent. At the outset, these systems were for the most part of limited capacity, providing service from generally no more than three television stations whose signals were captured directly off the air at a relatively high location and distributed by cable to subscribers. In these early stages of CATV development, the Commission at first largely ignored such operations and then, upon conducting an investigation of the matter, concluded that CATV was not an appropriate subject for Commission regulation.¹ As time progressed, the industry continued to grow and expand both in number of subscribers and number of television channels delivered to subscribers. In addition, CATV systems also began to distribute to their subscribers television signals originating from stations distant from the CATV community. Often these distant signals were delivered to the CATV system by means of microwave relay.² In view of these developments, commencing in 1962, the Commission, on a case-by-case basis, began to reassess its role with respect to the CATV industry and to exercise jurisdiction over it

¹ See *Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" and the Orderly Development of Television Broadcasting*, 26 FCC 403.

² Microwave relay involves receiving television signals at a favorable receiving location and transmitting them by means of high frequency radio waves to locations where the signal of the originating station could not otherwise be received.

in acting on applications for microwave authorizations.³ Later, by rule making, the Commission asserted jurisdiction over all CATV operations where the television signals were received by means of microwave.⁴ Ultimately, finding that the unregulated growth of CATV systems, whether receiving signals off-the-air or by microwave, could have an adverse effect upon the development of free, over-the-air broadcasting, and in particular upon the growth and development of UHF broadcasting, the Commission assumed jurisdiction over all CATV operations by adopting rules and regulations designed to minimize the impact of CATV development on the growth, and continued vitality of the television industry.⁵

The regulations adopted by the Commission during this period related entirely to those functions of CATV systems which involved reception of signals transmitted by broadcast stations and their simultaneous transmission by cable to subscribers. Thus, the rules dealt with the signals which a CATV system was eligible to carry, those which it was required to carry, program exclusivity requirements which CATV systems were required to afford various classes of television stations, and the procedures for implementing these provisions. The validity of these rules and regulations was sustained by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). In that decision, however, this Court emphasized that the only authority which it recognized the Commission to have over CATV

³ See *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff'd sub nom. Carter Mountain Transmission Corp. v. FCC*, 321 F. 2d (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963).

⁴ *First Report and Order*, 38 FCC 683 (1965).

⁵ *Second Report and Order*, 2 FCC 2d 725 (1966).

was that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" and that it was expressing no view "as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." *Id.* at 178.

The rules and regulations relating to CATV systems considered by this Court in *Southwestern Cable* were silent with respect to either the right or obligation of CATV systems to originate programs of their own. On December 12, 1968, the Commission adopted its *Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397*, 15 FCC 2d 417, instituting the proceeding which resulted in the promulgation by the Commission of the requirement that all CATV systems with 3500 subscribers or more originate their own programming in a manner similar to the way television stations originate programming. It is the validity of this requirement which is at issue in this case.⁶

ARGUMENT

The court below was clearly correct in its ruling that the Commission is without authority to compel operators of CATV systems to "engage in the entirely new and different business of originating programs" as a condition of remaining in the business of capturing television signals off-the-air and transmitting them by cable to subscribers. (Pet. App. A, pp. 23-24). No contention is made that this decision conflicts with the

⁶ The Commission in the same proceeding also adopted rules and regulations similar to those applicable to television broadcast stations regulating the program operations of CATV systems. The Court below did not pass upon the validity of these regulations.

decisions of any other Court of Appeals. Moreover, the ruling of the court below does not raise any substantial questions of general importance concerning the authority of the Commission to regulate other aspects of CATV operations. The consideration, therefore, of the broader question of the Commission's authority to adopt a comprehensive regulatory scheme for CATV which is invited by Petitioners would be premature at this time. Accordingly, review by this Court is not warranted.

The court below held that regardless of whether the Commission's authority in the CATV area was limited to regulation "reasonably ancillary" to the effective regulation of broadcasting as this Court ruled in *Southwestern* or whether its authority was much broader, as the Commission argued, the Commission was without authority to condition continuation in the business of receiving and distributing programs by CATV systems on the willingness of such systems to enter into the business of originating programs.⁷ (Pet. App. A, pp. 23-25). The court below recognized the fundamental distinction which exists between the business of receiving and retransmitting programs originated by television broadcast stations and the business of producing and distributing original programs. (Pet. App. A., pp. 20-21). This distinction has been plainly spelled out by this Court in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-401 (1968).

⁷ The views expressed in the Petition on the merits of this case are expressly represented as being those of the Commission, not the United States. (Pet., pp. 1 and 13). Therefore, positions and arguments contained in the Petition which are discussed herein will be attributed to the Commission.

and was elaborated upon by the court below as follows (Pet. App. A, p. 24):

Entering into the program origination field involves very substantial expenditures. Costly equipment must be purchased. Personnel must be employed who are skilled in photography, sound production, program planning and direction and performing. Such expenses will often prove burdensome because of the limited area the program will reach. See Federal Regulation of Cable Television: The Visible Hand, Chazen and Ross, 83 Harvard L. Rev. 1920.

Finding that traditional CATV operations and cablecasting operations are different businesses, the court correctly concluded that the Commission was without authority to condition the right of persons engaged in CATV operations to continue in such business upon their becoming program originators. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926). The imposition of such a condition would amount to confiscation of property.

The Commission's contention that there is no evidence in the record that cablecasting would be economically burdensome in individual cases (Pet. p. 11, note 10) misses the point. The issue in this proceeding, as recognized by the court below, was not whether individual CATV systems could survive economically if required to cablecast, but whether the Commission had the authority to require CATV systems, against their will, to enter into this business. In its *First Report and Order* the Commission cites data indicating that the costs involved in converting a CATV reception-distribution system to a cablecasting system would range from \$27,300 for a basic black and white system to \$95,000 for a full color system and that annual op-

erating costs would range from \$14,400 for a black and white system to \$33,000 for color operations. (Pet. App. C, p. 40). A review of the various factors involved in these cost estimates leaves no doubt that cablecasting is not merely an adjunct of CATV operations, but is, as the court below observed, an entirely different business activity requiring different equipment, materials and personnel.⁸

General Telephone Co. of California v. FCC, 413 F. 2d 390 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1970) is not authority, as the Commission apparently suggests, for the proposition that its regulatory authority over CATV operations is plenary. The issue before the court in *General Telephone* was whether the Commission's assertion of authority to regulate the conditions under which telephone companies undertook to distribute television signals to CATV systems under Section 214(a) of the Communications Act (47 U.S.C. § 214(a)) was sustainable. The telephone companies argued that their activities in distributing television signals to CATV systems were wholly intrastate, and therefore, beyond the pale of Section 214(a). The court held that the fact that the activities of telephone companies were confined within the boundaries of the State of California did not remove such activities from the common carrier jurisdiction of the Commission noting (*Id.* at 401):

The Petitioners have, by choice, inserted themselves as links in this indivisible stream [from

⁸ The fact that cablecasting and CATV both require the same type cables for distributing their product to subscribers does not make cablecasting any more an integral part of the business of operating a CATV system than does the fact that cablecasting and television broadcasting both require the same type of program origination equipment and personnel make cablecasting an integral part of the business of broadcasting.

television station to viewer] and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission.

It is clear from the context of the case that the court did not intend to suggest in the language just quoted that anyone deriving economic benefits from broadcast signals is subject to the Commission's "pervasive jurisdiction." The "pervasive jurisdiction" of the Commission referred to in *General Telephone* was its common carrier jurisdiction. The telephone companies challenging the Commission's authority were admittedly common carriers, but they sought to escape the Commission's jurisdiction on the grounds that distributing television signals to CATV systems was "intra" rather than "inter" state. The court found that the carriage was interstate and held, therefore, that the petitioners were subject to the Commission's common carrier jurisdiction.⁹ What the Court held was that since interstate commerce was involved, the exemption for intrastate operation of common carrier was not available. The effect of the ruling was that the specific provisions of Sec. 214(a) of the Communications Act were applicable to the carrier and that it could not construct certain facilities without Commission consent. However, the ruling of *General Telephone* could hardly be construed as a recognition of authority on the part of the Commission to compel the common carrier to

⁹ The court specifically recognized, however, that a CATV system carrying interstate signals for its own use, is not a common carrier and, therefore, would not be subject to this "pervasive jurisdiction" which resulted from the Commission's express authority to regulate communications common carriage. *Id.* at 393-94, note 3.

operate a television station, originate programs over cables, publish a newspaper or undertake similar activities which the Commission might deem to be in the public interest. By the same token the mere fact that CATV operations constitute interstate communication by wire cannot be construed as conferring upon the Commission the power to compel CATV companies to become broadcasters. The Communications Act confers no such authority on the Commission with respect to broadcast applicants—they are free to apply for the privilege to broadcast; they cannot be compelled to do so. There is no reason why such a power should be held to exist in the case of CATV companies. The Commission is attempting to stretch its authority in a manner tantamount to a government ukase, to a company like General Motors that its right to continue in the business of manufacturing cars and trucks would be terminated unless it agreed to enter the business of manufacturing helicopters.

II.

Despite the Commission's protestations to the contrary, it is clear that the Petition raises no broad issues of general significance requiring resolution now by this Court. The Commission contends that the ruling of the court below restricts its jurisdiction to regulate CATV as part of its overall scheme "to establish a unified system of regulation of the 'radio and wire' communications industry" and the Commission holds up before this Court the specter of "disparate state and local regulation of CATV services" and a return to the chaos in the communications field which existed prior to the enactment of the Communications Act. (Pet., pp. 11-13). The narrow ruling of the court below is clearly incapable of having the disastrous effects upon the

Commission's "unified system of regulation of the 'radio and wire' communications industry" which the Commission claims.

First, it has already been pointed out there is nothing in the court's ruling which in any way passes upon the Commission's authority to regulate program operation by CATV systems voluntarily engaging in program origination. The court's decision thus has no bearing on possibilities of "chaos" resulting from unregulated program operation by CATV systems.

Secondly, it is apparent from the Petition that the Commission's concern is really not mandatory origination as such but rather its fear as to the validity of a series of Commission proposals not yet adopted, which envisage the integration of CATV into a comprehensive program to regulate the nation's communications media. (Pet., p. 13). The validity of these proposals was not considered, let alone passed upon, by the court below. Therefore, it is clear that consideration by this Court of the Commission's authority to adopt the comprehensive regulatory scheme which it is contemplating would be premature. Mandatory program origination constitutes only one element of that proposed regulatory scheme, and a limited one at that, as a review of the Commission's letter to the Chairmen of the Senate Communications Subcommittee and the House Communications and Power Subcommittee, *In re Commission Proposals For Regulation of Cable Television*, 31 FCC 2d 115 (1971), makes clear. The thrust of that regulatory scheme as disclosed thus far, is to require increased channel capacity and the dedication of channels for various public uses. Under the Commission's proposals, the responsibility for programming these channels would be placed on various elements of

the public, and not on the CATV operator. CATV operators have been in the business of providing communications channels to their subscribers, and regulation of the number of channels that must be made available and the means for making them available may involve considerations different from those raised by a requirement that the CATV operator himself go into the entirely new business of originating programming. Thus, a determination of the Commission's power to adopt the comprehensive scheme to integrate communications media can only be made after its regulations have been formulated and the Commission has made a factual determination on the relationship of the regulations to its statutory authority.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WAYNE W. OWEN
HARRY M. PLOTKIN
GEORGE H. SHAPIRO
DAVID TILLOTSON

Counsel for Respondent

Of Counsel:

MOSES, McCLELLAN; ARNOLD,
OWEN & McDERMOTT
Union Life Building
Little Rock, Arkansas 72201

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D. C. 20006

November, 1971

FILE NO. 73-505

FEB 14 1974

U.S. DEPT. OF JUSTICE

In the Supreme Court of the United States

October Term, 1973

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

VS.
MIDWEST VIDEO CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL
COMMUNICATIONS COMMISSION

HERMAN E. GREENWOLD

Attorney General

LAWRENCE G. WALLACE

Deputy Attorney General

ROBERT M. STONE

Assistant to the Attorney General

Department of Justice

Washington, D.C. 20530

JOHN W. PATTERSON

Assistant Attorney General

ROBERT A. KENNEDY

Attorney

United States Department of Justice

Washington, D.C. 20530

I N D E X

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute and regulation involved.....	2
Statement.....	2
Summary of Argument.....	7
Argument.....	9
The Federal Communications Commission's rule requiring CATV operators who trans- mit broadcast signals also to originate programs is within the Commission's statu- tory authority.....	9
Conclusion.....	22
Appendix.....	23

CITATIONS

Cases:

<i>American Trucking Assns. v. United States</i> , 344 U.S. 298.....	11
<i>Carter Mountain Transmission Corp. v. Federal Communications Commission</i> , 321 F.2d 359, certiorari denied, 375 U.S. 951.....	17
<i>Federal Communications Commission v. Potts- ville Broadcasting Co.</i> , 309 U.S. 134.....	11, 14
<i>Federal Power Commission v. Transcontinental Gas Pipe Line Corp.</i> , 365 U.S. 1.....	17
<i>Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.</i> , 289 U.S. 266.....	17
<i>Frost and Frost Trucking Co. v. Railroad Com- mission</i> , 271 U.S. 583.....	15

Cases—Continued

Page

General Telephone Company of California v. Federal Communications Commission, 413 F. 2d 390, certiorari denied, 396 U.S. 888. 14, 17, 19

Midwest Television, Inc., 13 F.C.C. 2d 478, affirmed, *Midwest Television, Inc. v. F.C.C.*, 426 F. 2d 1222. 4

National Broadcasting Co. v. United States, 319 U.S. 190. 11, 14, 20

Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.S.C. 2d 417. 3

Philadelphia Television Broadcasting Co. v. Federal Communications Commission, 359 F. 2d 282. 14

United States v. Storer Broadcasting Co., 351 U.S. 192. 11

United States v. Southwestern Cable Co., 392 U.S. 157. 2, 6, 7, 8, 10, 11, 13, 17, 18

Statutes and regulations:

Communications Act of 1934, 48 Stat. 1064, as amended:

Section 1, 47 U.S.C. 151. 10, 23

Section 2(a), 47 U.S.C. 152(a). 3, 7, 10, 11, 23

Section 3(a) 47 U.S.C. 153(a). 24

Section 3(b) 47 U.S.C. 153(b). 24

Section 3(d) 47 U.S.C. 153(d). 25

Section 4(i), 47 U.S.C. 154(i). 11

Section 301, 47 U.S.C. 301. 18, 25

Section 303(g), 47 U.S.C. 303(g). 8, 15, 18, 26

Section 303(r), 47 U.S.C. 303(r). 11, 18, 26

Section 307(b), 47 U.S.C. 307(b). 15, 27

Section 315, 47 U.S.C. 315. 4, 14

Section 317, 47 U.S.C. 317. 4

Federal Campaign Act of 1971, Section 104, P.L. 92-225. 13

Miscellaneous:

	Page
Addenda to Television Factbook, vol. 11-40, October 4, 1971	19
33 Fed. Reg. 19028	3
37 Fed. Reg. 3252	21
37 Fed. Reg. 3275	9, 21
<i>Regulation of Community Antenna Television</i> , 70 Columbia Law Review, 837, 850-853	21
S. Conf. Rep. No. 92-580, 92d Cong., 1st sess.	13
Television Factbook, 1971-1972, services vol- ume	19

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION

v.

MIDWEST VIDEO CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL
COMMUNICATIONS COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 15-29) is reported at 441 F. 2d 1322. The orders of the Federal Communications Commission (Pet. App. C, D, and E, pp. 31-67) are reported at 20 F.C.C. 2d 201, 23 F.C.C. 2d 825, and 27 F.C.C. 2d 778.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1971 (Pet. App. B, p. 30). By order of Mr. Justice Blackmun, the time within which to petition for a writ of certiorari was extended to October 9,

1971. The petition was filed on October 8, 1971, and granted on January 10, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission's rule requiring community antenna television systems with 3,500 or more subscribers to originate programming is within the Commission's statutory authority.

STATUTE AND REGULATION INVOLVED

Sections 1, 2(a), 3(a), 3(b), 3(d), 4(i), 301, 303 (g), 303(r), 307(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, 152 (a), 153(a), 153(b), 153(d), 154(i), 301, 303(g), 303 (r), 307(b), are set forth in the Appendix to this brief (*infra*, pp. 23-27). The rule under review is also set forth in the Appendix, *infra*, pp. 27-28.

STATEMENT

This case arises from an order of the Federal Communications Commission adopting a rule requiring community antenna television (CATV) systems with more than 3,500 subscribers, as a condition for the carriage of television broadcast signals, to originate programming and to make available facilities for local program production. The court of appeals held that the Commission lacks statutory authority to require program origination.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, this Court held that CATV systems engage in "interstate * * * communication" by wire or radio"

within the meaning of Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a), and that the Federal Communications Commission therefore has regulatory jurisdiction over CATV at least insofar as its regulation is "reasonably ancillary" to its regulation of the broadcast industry. Shortly thereafter the Commission launched a general inquiry "to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology and potential services * * *." *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C. 2d 417; 33 Fed. Reg. 19028 (App. 3-50).¹ In particular, the Commission requested comments on whether it should require CATV systems to originate programming; whether advertising should be permitted; and whether the broadcast concepts of "equal time", "fairness" and sponsorship identification ought also to apply to CATV.²

On October 24, 1969, the Commission issued a report, 20 F.C.C. 2d 201, Pet. App. C, pp. 31-56, dealing with the subject of program origination, or "cablecasting", by CATV systems. In this report, the Commission adopted a rule which provides that a CATV system

¹ "It now appears," the Commission noted, that "cable technology may be on the verge of expanding system capacity to 20 or more channels, and that a variety of new services to the public are envisioned." *Id.* at 418 (App. 8).

² Other areas of inquiry included cross-ownership of television stations and CATV systems; use of CATV channels to provide common carrier service; and importation of distant signals into major markets.

having 3,500 or more subscribers³ may not distribute the signals of television broadcast stations unless it also operates "to a significant extent as a local outlet by cablecasting" and by having available "facilities for local production and presentation of programs other than automated services" (Pet. App. C, p. 53).⁴ The Commission had observed in its Notice of Rulemaking that the CATV industry was placing increased emphasis on program origination, including both local public service and entertainment programs, and on providing other nonbroadcast services to the public such as time, weather, and news reports and advertising.⁵ On the

³ In setting 3,500 subscribers as a feasible minimum size for systems required to originate programs, the Commission took into account record evidence on the estimated cost of constructing and operating cablecasting systems of varying degrees of sophistication and industry statistics which showed that 70% of the cablecasting systems currently originating programs had less than 3,500 subscribers and more than 50% had less than 2,000 subscribers. 20 F.C.C. 2d 201, 209-214 (Pet. App C, pp. 39-44).

⁴ In addition, the Commission adopted rules limiting advertising messages to the beginning and end of each cablecast program and to natural breaks or intermissions within the program, and rules designed to achieve diversity in programming. Also adopted were regulations similar to those which the Communications Act and Commission rules make applicable to broadcasters with respect to cablecasts by candidates for public office, programs dealing with controversial issues of public importance and sponsorship identification of matter the system has been paid to cablecast (cf. 47 U.S.C. 315, 317).

⁵ The Commission also referred to its earlier consideration of the subject in a CATV hearing involving the San Diego area. *Midwest Television, Inc.*, 13 F.C.C. 2d 478, affirmed, *Midwest Television, Inc. v. F.C.C.*, 426 F. 2d 1222 (C.A.D.C.). In that case the Commission authorized a test of unrestricted program origination without commercials by CATV systems in the San Diego area, and conditioned the carriage "of broadcast signals

basis of the comments submitted in the rule-making proceeding the Commission concluded that CATV program origination serves the public interest by providing program diversity and creating outlets for self-expression, particularly in those areas where the establishment of broadcast stations has not proven feasible (Pet. App. C, pp. 43-44), and that the most effective way to encourage cablecasting would be to condition "where practicable, the carriage of broadcast signals upon a requirement for program origination" (Pet. App. C, p. 38).

The Commission justified the exercise of its jurisdiction to require program origination on the ground that

The use of broadcast signals, has enabled CATV to finance the construction of high capacity cable facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to "encourage the larger and more effective use of radio in the public interest"

by one system upon a requirement that it operates to a significant extent as an outlet for noncommercial community self-expression." 13 F.C.C. 2d at 510. The Commission there noted at some length (*id.* at 503-508) the benefits to be gained from program origination, in particular the increase it would provide in the number of local outlets for community self-expression and for augmenting the public's choice of programs and types of service. The Commission also pointed out in that case that "CATV program origination does not entail the question of 'unfair competition' posed by CATV importation of broadcast signals from another market (*Second Report*, 2 F.C.C. 2d at 778-781), or any disparate situation with respect to copyright liability, and would be less likely to duplicate the programs of local broadcast stations." *Id.* at 506.

([47 U.S.C.] 303(g)). The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities ([47 U.S.C. 307(b)], in areas where we have been unable to accomplish this through broadcast media.

20 F.C.C. at 208; Pet. App. C, pp. 38-39.

Upon the challenge of respondent, an operator of CATV systems in Missouri, New Mexico, and Texas, the court of appeals set aside the program origination requirement on the ground that the Commission did not have the statutory authority to adopt it. Citing *Southwestern Cable, supra*, the court held that the cablecasting requirement is not "ancillary" to the Commission's responsibilities in the broadcast field and hence that program origination by CATVs is beyond the scope of the Commission's jurisdiction. The court rejected the Commission's contention that the Communications Act was intended to confer unified jurisdiction and broad authority over all of the nation's wire and radio communication systems.⁶ Judge Gibson concurred in the result, concluding that while the Commission has the necessary authority over CATV to adopt the rule in question, and while the rule "is in the public interest, it does not appear that the FCC has shown a sufficient basis for exercising its authority at this time" (Pet. App. A, p. 28).

⁶ The court did not pass on the other rules relating to program origination, stating that since the petitioner could not be compelled to cablecast, it lacked standing to challenge rules regulating cablecasting.

SUMMARY OF ARGUMENT

Congress created the Federal Communications Commission in 1934 for the purpose of centralizing into one agency regulatory authority over the developing radio communications industry. The language of Section 2(a) of the Communications Act, 47 U.S.C. 152 (a), which extends the Commission's jurisdiction to "all interstate and foreign communication by wire or radio," indicates that Congress intended to provide for regulation of new developments, as well as then-existing technology, in the continuously evolving uses of wire and radio.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, this Court noted that CATV systems engage in "interstate communication by wire or radio," and that the Commission has jurisdiction to regulate CATV even though cable systems were developed subsequent to the passage of the Act and are not specifically referred to in the Act's provisions. Referring to the legislative history of the Act, the Court emphasized Congress' desire to assure unified regulation of all forms of radio and wire communication. In this respect, the Court's opinion supports the view that the Act confers on the Commission essentially the same jurisdiction over CATV that it has over the broadcasting industry. Indeed, except for certain special problems applicable to the allocation of the limited resources of the broadcast spectrum, there is as much need for the Commission's regulation of CATV as of broadcasting in light of the essential similarity of service offered to the television viewer.

Even though it indicated a very broad view of the Commission's jurisdiction to regulate CATV, the Court noted in *Southwestern* that it was not required to define the full scope of that jurisdiction, but merely to decide whether the Commission had jurisdiction to regulate CATV in ways which are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. In our view, the present case also does not require the Court to determine whether the Act confers on the Commission full authority to regulate CATV in the absence of any substantial connection with the broadcast industry, for the regulation held invalid by the court below applies only to CATV systems "which carry the signal of any television broadcast station". Even if Commission regulation of CATV must be substantially related to regulation of broadcasting, the requisite relationship is present where, as here, the Commission attempts to require CATV operators, whose principal product is the retransmission of broadcast signals and who serve the same functions in many areas as broadcasters, to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters. Indeed, the conditioning of broadcast signal transmission on program origination properly implements Congress' directive that the Commission shall "[s]tudy new uses for radio * * * and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g).

In its recent study of the operation of state and local regulation of the rapidly growing CATV in-

dustry, the Commission concluded that to the extent that local regulation has proceeded without federal guidelines, the result has been "confusion" and a "patchwork of disparate approaches * * *." 37 Fed. Reg. 3275. In our view, the Communications Act was specifically designed to prevent this kind of chaos from occurring in the communications field. The Commission has recently promulgated regulations which set forth standards to be followed by state or local franchising authorities in order to ensure that local CATV franchising proceedings will be conducted in conformity with the Commission's view of the public interest standards reflected in the Communications Act. Like the program origination rule, these regulations illustrate the Commission's intention to integrate cable systems which transmit broadcast signals into the national communications system in a way that will encourage use of all available communications technology in furtherance of the objectives of the Communications Act.

ARGUMENT

THE FEDERAL COMMUNICATIONS COMMISSION'S RULE REQUIRING CATV OPERATORS WHO TRANSMIT BROADCAST SIGNALS ALSO TO ORIGINATE PROGRAMS IS WITHIN THE COMMISSION'S STATUTORY AUTHORITY

The cablecasting rule is part of a comprehensive regulatory program which the Commission is developing to integrate cable television into the nation's communications system. Until recently, the Commission's regulation of CATV sought primarily to prevent cable television from unfairly undermining the foundation of existing over-the-air broadcast services. The cable-

casting rule which respondents attack in this case seeks to supplement current communications service by requiring CATV systems which transmit broadcast signals to provide additional diversity of programming. See *infra*, pp. 14-15. The decision below, holding that the Commission lacks jurisdiction to require cablecasting by CATV systems, is, in our view, contrary to the rationale of the Federal Communications Act of 1934 and inconsistent with this Court's view of that Act as expressed in *United States v. Southwestern Cable Co.*, 392 U.S. 157.

1. Congress created the Federal Communications Commission in 1934 for the purpose of "centralizing authority heretofore granted by law to several agencies and * * * granting additional authority" in order to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities * * *". Section 1, 47 U.S.C. 151. Under Section 2(a) of the Act, 47 U.S.C. 152(a), the Commission's authority extends to "all interstate and foreign communication by wire or radio" and "to all persons engaged within the United States in such communication."

The scheme of regulation created by the Act is not, as the decision below implies, restricted to forms of wire and radio communication in use at the time the Act was passed; rather, the Act was also designed to provide for regulation of new developments in the continuously evolving uses of wire and radio. With respect to both technological and economic regulation the Commission is given comprehensive powers "to promote and realize the vast potentialities of radio."

National Broadcasting Co. v. United States, 319 U.S. 190, 217; see *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. Thus, with respect to the Commission's rulemaking powers, Section 4(i), 47 U.S.C. 154(i), contains a broad grant of authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." These rulemaking powers are "coterminous with the scope of agency regulations * * *." *American Trucking Assns. v. United States*, 344 U.S. 298, 311; see *id.* at 309-311.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157, this Court upheld the Commission's authority to stay CATV transmission of distant broadcast signals, pending a hearing, into the one hundred largest television markets. The Court first noted that CATV systems engage in "interstate * * * communication by wire or radio" within the meaning of Section 2(a) of the Act. 392 U.S. at 168-196. Then, rejecting the contention that the Act "limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions," 392 U.S. at 172, the Court emphasized Congress' intention, as reflected in the legislative history, that all branches of the wire or radio communica-

⁷ Section 303(r), 47 U.S.C. 303(r), similarly grants the Commission authority "[e]xcept as otherwise provided in this Act * * * from time to time, as public convenience, interest, or necessity requires * * *" to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *."

tions industry be subject to a unified regulatory system:

We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The section itself states merely that the "provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio * * *." Similarly, the legislative history indicates that the Commission was given "regulatory power over all forms of electrical communication * * *". S. Rep. No. 781, 73d Cong., 2d Sess., 1. Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *F.C.C. v. Pottsville Broadcasting Co.*, *supra*, at 138, that it conferred upon the Commission a "unified jurisdiction"⁸ and "broad authority."⁹ Thus, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors * * *." [392 U.S. at 172-173; footnotes renumbered.]

⁸ "S. Rep. No. 781, *supra*, at 1" (footnote by the Court).

⁹ "H.R. Rep. No. 1850, *supra*, at 1" (footnote by the Court).

The Court's emphasis of Congress' desire to assure unified regulation of all forms of radio and wire communication, reflected in the quoted portions of the *Southwestern* opinion, supports the view that the Act confers on the Commission essentially the same jurisdiction over CATV that it has over the broadcasting industry.¹⁰ Indeed, it seems logical that if Congress had foreseen the development of CATV it would have wanted that industry to be regulated in furtherance of the same policy objectives that obtain with respect to the broadcast industry.¹¹ It is true, of course, that reg-

¹⁰ While we recognize that "the views of one Congress as to the construction of a statute adopted many years before by another Congress" are by no means controlling, *United States v. Southwestern Cable Co.*, *supra*, 392 U.S. at 170, we note that the current Congress appears to assume that the Commission has broad authority to regulate CATV. Section 104 of the Federal Election Campaign Act of 1971, Public Law No. 92-225, imposes limitations on expenditures for use of "broadcasting stations" in connection with certain federal elections. Section 104(f)(1)(A) specifies that the term "broadcasting station" includes for these purposes a CATV system. The conference report on the bill notes that the original Senate bill contained a provision requiring broadcasting stations to file reports on candidate expenditures if required to do so by Commission regulations. The House amendment contained no reporting provision. At conference, the reporting provision was deleted "because the FCC has adequate authority to require reports under existing law." S. Conf. Rep. No. 92-580, 92d Cong., 1st Sess., p. 26. Since the substantive provisions of Section 104 are explicitly applicable to expenditures for use of CATV systems, the implication of this explanation by the conference committee is that "existing law", by which the committee must have meant the Communications Act, empowers the Commission to impose reporting requirements on CATV operators.

¹¹ Of course, "Congress in passing the Communications Act of 1934 could not * * * anticipate the variety and nature of methods of communication by wire or radio that would come

ulation of broadcasting must take account of the need to allocate the limited resources of the broadcast spectrum. In all other respects, however, there is as much need for the Commission's regulation of CATV as of broadcasting. This is especially apparent from the standpoint of the television viewer, who can easily flip the dial between broadcasting and cablecasting channels. If cablecasters, for example, were free to present only one side of a controversial issue or to give time only to the candidates of one party, the overall effect of the Commission's equal opportunities and fairness doctrine (see 47 U.S.C. 315) would be undermined. Similarly, the public's need for diversified programming, reflected in the program origination requirement under attack in this case, is applicable both to broadcasters and CATV operators.

into existence in the decades to come." *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 359 F. 2d 282, 284 (C.A.D.C.). Accordingly, "in the context of the developing problems to which it was directed, the Act gave the Commission not niggardly, but expansive powers." *National Broadcasting Co. v. United States*, 319 U.S. 190, 249; see also *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138. In exercising these powers, the Commission "is entitled to latitude in coping with new developments in that industry," *Philadelphia Television*, *supra*, 359 F. 2d at 284 (in which the court sustained the Commission's decision not to regulate CATVs as common carriers). As the court there stated (359 F. 2d at 284), "In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective." See also *General Telephone Company of California v. Federal Communications Commission*, 413 F. 2d 390 (C.A.D.C.), certiorari denied, 396 U.S. 888.

Indeed, the new technology of cablecasting, which is available to CATV operators who at present are deriving their basic or sole economic nurture from broadcasting (see *infra*, pp. 16-17), presents a means of expanding program diversification beyond the limits previously imposed by the physical limitations of the broadcast spectrum. Hence the promotion of effective use of CATV's communications potential is now, in our view, a significant aspect of the Commission's statutory responsibility to "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g)) and to provide a "fair, efficient, and equitable distribution of television service" to the various "states and communities" (47 U.S.C. 307 (b)).¹²

2. Even though it indicated a very broad view of the Commission's jurisdiction to regulate CATV, the Court noted in *Southwestern* that it was not required to define the full scope of that jurisdiction, but merely had to decide whether the Commission had jurisdiction to regulate CATV in ways which are "reasonably ancillary to the effective performance of the Commis-

¹² Because of the close functional relationship between CATV and the broadcast industry, and the equal applicability of most of the public interest concepts of the Act to both forms of communication, we submit that *Frost and Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, referred to by the court below, is inapposite here. In *Frost* the Court held unconstitutional an order of the California Railroad Commission requiring that applicants for permission to become private automobile carriers for hire agree to operate also as common carriers and to submit to the full regulatory scheme applicable to common carriers.

sion's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. Relying upon this cautionary language, the court of appeals seems to have concluded that the Commission's regulation in the CATV area must be designed only to prevent harmful competitive effects on the broadcast industry; and that regulation of CATV for the purpose of assuring that CATV systems adhere to the same public interest standards that are applicable to broadcasters is inappropriate.

In our view, the present case also does not require the Court to determine whether the Act confers on the Commission full authority to regulate CATV in the absence of any substantial connection with the broadcast industry. There is no need here, for example, for the Court to determine whether the Commission has regulatory jurisdiction over wire communications systems whose operation does not involve the transmission of broadcast signals. For the regulation held invalid by the court below applies only to CATV systems "which carry the signal of any television broadcast station," and operates only to preclude the transmission of broadcast signals in the absence of a cablecasting program. Even if Commission regulation of CATV must be "reasonably ancillary" or substantially related in some way to regulation of broadcasting, there is no reason to believe that Congress intended to restrict the Commission to regulation designed to prevent deleterious competition with the broadcasting industry.

Indeed, the CATV systems to which this regulation is applicable are largely dependent for their existence

upon the broadcast signals that they pick up, and transmit. See Pet. App. C. p. 52. Cf. *United States v. Southwestern Television, supra*, 392 U.S. at 161-162. Having become "an integral part of interstate broadcast transmission," CATV operators "cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission." *General Telephone Co. of California v. Federal Communications Commission*, 413 F.2d 390, 401 (C.A.D.C.) (per Burger, J.), certiorari denied, 398 U.S. 888; see also *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266; *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7; *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F.2d 359 (C.A.D.C.), certiorari denied, 375 U.S. 951. Thus, even if there must be some relation between the Commission's regulation of CATV and its responsibilities in the broadcasting area, the requisite nexus is surely present where, as here, the Commission attempts to require CATV operators, whose principal product is the retransmission of broadcast signals and who serve the same functions in many areas as broadcasters, to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters. Indeed, in the context of present technological possibilities, the conditioning of broadcast signal transmission on program origination properly implements Congress' directive that the Commission shall "[s]tudy new uses for radio * * * and generally encourage the larger and more effective use of radio in the

public interest." 47 U.S.C. 303.(g).¹³ For, as previously noted, cablecasting by CATV operators now provides a practical means for augmenting program diversification beyond the limitations inherent in the broadcast spectrum—a means that will be wasted if CATV operators are permitted to transfer the same limitations into their own activities by restricting their operations to the transmission of broadcast materials.

3. Though the holding below is based on jurisdictional grounds and the court referred to the "reasonably ancillary" language of the *Southwestern* case, most of the court's opinion deals with the court's view of the wisdom of the program origination requirement, which it considered economically burdensome to cablecasters.¹⁴ This factor, of course, bears not upon the

¹³ Moreover, since CATV systems are engaged in "the transmission of * * * signals by radio," within the meaning of 47 U.S.C. 301, the Commission is empowered to license their operation and to subject them to the licensing standards applicable to any other transmitter of radio signals. See 47 U.S.C. 303(r). The Commission has not yet undertaken to license CATV operators in the same manner as it licenses broadcasters, but does require CATV operators to obtain certificates of compliance, see *infra*, p. 21.

¹⁴ The record before the Commission, however, does not support this conclusion. In considering the financial impairment contentions of the parties, the Commission noted that the record contained "no data tending to demonstrate that systems with 3,500 subscribers cannot cablecast without impairing their financial stability * * *". The Commission pointed out that 70% of the systems already originating programs had fewer than 3,500 subscribers. Moreover, the court failed to consider either the available data on costs before the Commission or the fact that the cablecasting requirement is very flexible (23 F.C.C. 2d at 826-827) and includes specific guidelines for waiver of the requirement if cablecasting would in fact be financially injurious to a system. 27 F.C.C. 778, 779-780.

Commission's jurisdiction, but upon the reasonableness of the regulation. We do not contend that the Commission's authority to regulate CATV is exempt from the requirement of reasonableness and we recognize that the question of the reasonableness of regulation in the CATV area might in some situations depend upon factors different from those present in the regulation of broadcasting. We submit, however, that the restriction by the court below of the Commission's *jurisdiction* to regulate the operation of CATV systems which are involved in the transmission of broadcast signals is contrary to Congress' intention, recognized by this Court, to establish a unified system of regulation of "radio and wire" communications services.

Indeed, denial of jurisdiction in the Commission to regulate CATV systems which transmit broadcast signals would open the door to disparate state and local regulation of CATV services in contravention of the objectives of uniform and integrated regulation which Congress sought to achieve. Cf. *General Telephone Co. of California v. Federal Communications Commission*, *supra*, 413 F.2d at 402. The CATV industry has grown at an extraordinarily rapid rate in recent years. There are now more than 2,500 CATV systems in operation (*Television Factbook*, 1971-1972, Services Volume, p. 18a), servicing an estimated 15 to 20 million viewers per day. In addition there are more than 2,000 CATV franchises outstanding for systems which are not currently operating, and approximately 2,600 franchise applications pending. *Addenda to Television Factbook*, Vol. 11-40, October 4, 1971. While

the growth of CATV is still accelerating, its enormous potential as a communication service to the public is now in clear enough focus to underscore the need for unified nation-wide regulatory authority at least to the extent that CATV systems draw their sustenance from broadcast signals. The alternative to Commission regulation is the kind of fragmented regulatory pattern and chaotic development which characterized broadcasting in its early years and which led to the enactment of the Communications Act of 1934. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 211-214. Although CATV itself had not yet been developed and was not specifically considered by Congress at that time, it was the purpose of the Communications Act to confer sufficient authority on the Commission to prevent this kind of chaos from occurring again in the communications field.

The cablecasting rule is, accordingly, part of a comprehensive regulatory program which the Commission is developing to integrate cable television into the nation's communications system. The Commission has recently studied the operation of state and local regulation of CATV and has concluded that, to the extent that local regulation has proceeded without federal guidelines,

This has resulted in a patchwork of disparate approaches affecting the development of cable television. While the Commission was pursuing a program to promote national cable policy, state and local governments were formulating policies to reflect local needs and desires. In many respects this dual approach worked well.

To a growing extent, however, the rapid expansion of the cable television industry has led to overlapping and sometimes incompatible regulations. This resulted in confusion, and we faced an obvious need to clarify the respective federal, state, and local regulatory roles. [37 Fed. Reg. 3275]

See also Note, *Regulation of Community Antenna Television*, 70 Columbia Law Review 837, 850-853.

In this connection, the Commission has recently promulgated regulations, for example, requiring a cable system which transmits broadcast signals to file a copy of its franchise with the Commission and a certificate showing that the franchising authority has held a public proceeding to consider the system operator's legal and financial qualifications and the adequacy of the system's construction arrangements. The Commission has also set forth standards to be followed by state or local franchising authorities in order to ensure that the local proceeding will be consistent with the Commission's view of the public interest standards reflected in the Communications Act. *Cable Television Service*, 37 Fed. Reg. 3252.¹⁵ The Commission also has promulgated new regulations with respect to the importation of distant television signals into the top one hundred television markets. *Id.* at 3262. Although these additional regulations are not before the Court in this case, they illustrate the Commission's intention to integrate cable systems which transmit broadcast

¹⁵ Copies of this report and order have been lodged with the Clerk of this Court.

signals into the national communications system in a way that will encourage use of all available communications technology in furtherance of the public interest standards embodied in the Communications Act.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

LAWRENCE G. WALLACE,
Deputy Solicitor General.

RICHARD B. STONE,
Assistant to the Solicitor General.

JOHN W. PETTIT,
General Counsel,

EDWARD J. KUHLMANN,
Attorney,

Federal Communications Commission.

FEBRUARY 1972.

APPENDIX

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,¹ and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communica-

¹ The provisions relating to the promotion of safety of life and property was added by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, 1st Session, approved and effective May 20, 1937, 50 Stat. 189.

tion by wire or radio and all interstate and foreign transmission of energy¹ by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.²

* * * * *

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and

² The words "the Philippine Islands or" preceding "the Canal Zone" are omitted on authority of Proc. No. 2695, effective July 4, 1946, 11 Fed. Reg. 7517, 60 Stat. 1352, recognizing the independence of the Philippine Islands.

delivery of communications) incidental to such transmission.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

SEC. 4(i). The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of

the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any

international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SEC. 307(b). In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

§ 74.1101 *Definitions*

(j) *Cablecasting*. The term "cablecasting" means programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system.

§ 74.1111 *Cablecasting in conjunction with carriage of broadcasting signals.*

(a) Effective on and after April 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecast-

ing and has available facilities for local production and presentation of programs other than automated services: *Provided, further,* That the system shall not enter into any contract, arrangement or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including the time period 6-11 p.m.), for local programing designed to inform the public on controversial issues of public importance.

(b) No CATV system shall carry the signal of any television broadcast station if the system engages in cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 74.1113, 74.1115, 74.1117, and 74.1119.

~~74.1111 suspended~~

~~[§ 74.1111 suspended; III (68) 14]~~

Sup. Court, U. S.
FILED

MAR 24 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

vs.

MIDWEST VIDEO CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATE OF ILLINOIS
AS AMICUS CURIAE

WILLIAM J. SCOTT,
Attorney General

PETER A. FASSEAS,
Special Assistant Attorney General
160 North La Salle Street
Chicago, Illinois 60601

ROLAND S. HOMER, JR.,
Special Counsel
Washington, D. C.

INDEX

	Page
Question presented	1
Statute and Regulations Involved	2
Amplification of Statement	2
Summary of Argument	4
Argument	
I. The FCC Regulations with respect to local origination cablecasting conflict with rules governing local cablecast services that have been and are being developed by States such as Illinois	11
II. State rather than federal regulation of local cablecast services accords with the traditional allocation of competence over wired communications as between State and national governments	17
III. Nothing in the Federal Communications Act or the decisions of this Court purports to alter this traditional division of authority as regards intrastate cablecast communications	22
IV. The FCC has made no findings and assigned no reasons that would bring intrastate cablecast communications within its Congressionally authorized sphere of authority	27
V. Any friction or inconvenience that may arise as between State regulation of local cablecast services and federal regulation of interstate broadcast-delivery cable services is a matter for resolution by the Congress	37

Conclusion.....	Page 42
Appendix.....	A1

CITATIONS

Cases:

<i>Buckeye Cablevision, Inc. v. Federal Communications Commission</i> , 387 F. 2d 220 (C.A.D.C. 1967)	24
<i>Federal Power Commission v. Florida Power & Light Co.</i> — U.S. —, 40 U.S. Law Week 4141 (1972)...	20, 34
<i>Federal Power Commission v. Transcontinental Gas Pipe Line Corp.</i> , 365 U.S. 1 (1961).....	29
<i>Fortnightly Corp. v. United Artists</i> , 392 U.S. 390 (1968)	18
<i>Frost & Frost Trucking Co. v. Railroad Commission of California</i> , 271 U.S. 583 (1926).....	9, 28
<i>National Broadcasting Co. v. United States</i> , 319 U.S. 190 (1943)	14, 39
<i>New State Ice Co. v. Liebmann</i> , 385 U.S. 262 (1913) ..	41
<i>Philadelphia Television Broadcasting Co. v. Federal Communications Commission</i> , 359 F. 2d 282 (C.A.D.C. 1966)	36
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	9, 28
<i>Smith v. Illinois Bell Telephone Co.</i> , 282 U.S. 133 (1930).....	8, 21, 32
<i>The Minnesota Rate Cases</i> , 230 U.S. 352 (1913).....	10, 21, 34, 40
<i>T.V. Pix, Inc. v. Taylor</i> , 396 U.S. 556 (1970).....	8, 15, 17, 18, 20
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 157 (1968).....	3, 16, 18, 22, 23, 24, 28, 35, 36

Statutes and regulations:

Communications Act of 1934, 48 Stat. 1064, as amended:

Section 1, 47 U.S.C. § 151..... 27

Section 2(a), 47 U.S.C., § 152(a)..... 23, 25, 27

Section 2(b), 47 U.S.C.

§ 152(b)..... 7, 21, 23, 25, 33, 35, 39

Section 3(h), 47 U.S.C. § 153(h)..... 7, 23, 24

Section 221(b), 47 U.S.C. § 221(b)..... 7, 27, 39

Section 301(d), 47 U.S.C. § 301(d)..... 7, 10, 23, 39

Mann-Elkins Act of June 18, 1910, ch. 309, 36 Stat.

539 8, 21

47 C.F.R. §§ 76.201-221..... 3, 13

Illinois Public Utilities Act, Ill. Rev. Stats., Ch. 111½,

Section 1 *et seq.*..... 14, 18, 20

Illinois Commerce Commission Notice of Proposed

Rule Making, Jan. 5, 1972..... 11, 15, 37, 41

Illinois Commerce Commission Interim Opinion and

Order, 91 P.U.R. 3d 37 (1971)..... 2, 9, 16, 18

Federal Communications Commission Proceedings:

Federal-State Advisory Committee Notice, 37 Fed.

Reg. 3204 (1972) 38

Cable Television Service, 37 Fed. Reg. 3252

(1972)..... 2, 12, 13, 15, 16, 26, 29, 30, 31, 35, 38

First Report and Order, 20 F.C.C. 2d 201 (1969).... 3, 4, 35*Clarification of First Report and Order*, 20 F.C.C. 2d

741 (1969)..... 4, 12

Notice of Proposed Rulemaking and Inquiry, 15

F.C.C. 2d 417 (1968)..... 16, 24

Second Report and Order, 2 F.C.C. 2d 725 (1966).... 16*Common Carrier Tariffs for CATV Systems*, 4 F.C.C.

2d 257 (1966)..... 7, 34

<i>CATV and TV Repeater Services</i> , 26 F.C.C. 403 (1959).....	35
---	----

Miscellaneous:

Hearings before the Senate Commerce Subcommittee on Communications, Feb. 8, 1972 (transcript in preparation).....	38
---	----

Letter from the Director, White House Office of Tele- communications Policy, to the Chairman, Senate Commerce Subcommittee on Communications, No- vember 15, 1971.....	8, 16, 25
---	-----------

S. 792, 92nd Cong., 1st Sess. (1971).....	25
---	----

H. Rep. No. 1635, 89th Cong., 2nd Sess. (1966).....	24
---	----

H. Rep. No. 109, 67th Cong., 1st Sess. (1921).....	20
--	----

Arthur D. Little, Inc. News Release (Jan. 1972).....	14
--	----

Gabel, Development of Separations Principles in the Telephone Industry (1967).....	20, 21, 32, 40
---	----------------

Note, <i>Unconstitutional Conditions</i> , 73 Harv. L. Rev. 1595 (1960).....	9, 28
---	-------

Sloan Commission on Cable Communications, On the Cable: The Television of Abundance (1971).....	13
--	----

Supreme Court of the United States

October Term, 1971

No. 71-506

**UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,**

Petitioners,

vs.

MIDWEST VIDEO CORPORATION,

Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**BRIEF FOR THE STATE OF ILLINOIS
AS AMICUS CURIAE**

QUESTION PRESENTED

Whether the Federal Communications Act establishes federal jurisdiction over intrastate wired communications, such as the locally originated cable signals covered by the Federal Communications Commission's regulations held invalid by the court below.

STATUTE AND REGULATIONS INVOLVED

Sections 2(a), 2(b), 3(a), 3(b), 3(h), 3(t), 221(b), 301(d) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 152(a), 152(b), 153(a), 153(b), 153(h), 153(t), 221(b), 301(d), are set forth in the Appendix to this brief (*infra*, pp. A1-A3). Also set forth in the Appendix for this Court's information are the "Summary and Order" section of the Interim Opinion and Order adopted September 9, 1971 by the Illinois Commerce Commission in its Docket 56191 (Investigation of Cable Television and other forms of Broadband Cable Communications in the State of Illinois) (*infra*, pp. A16-A21); and Section B4 of the Notice of Proposed Rule Making adopted January 5, 1972 by the Illinois Commerce Commission in the same proceeding (*infra*, pp. A22-A31).¹

AMPLIFICATION OF STATEMENT

An agreed glossary of terms may be helpful at the outset to the Court's understanding of this case. A good starting point is the "Definitions" section, § 76.5, of the comprehensive regulations recently adopted by the Federal Communications Commission. Cable Television Service, 37 Fed. Reg. 3252.² This section divides the signals that are carried over cable systems into four classes: (I) television broadcast signals, (II) non-broadcast signals, (III) scrambled non-broadcast signals, and (IV) return-path, or subscriber-originated, non-broadcast signals. All three varieties of non-broadcast signals (Classes II, III, and IV)

1. Copies of the full texts of both these documents have been lodged with the Clerk of this Court.

2. Copies of this report and order have also been lodged by the Solicitor General with the Clerk of this Court.

are collectively defined as "cablecasting" in subsection (v) of the regulations. Subsection (w) in turn defines the term "origination cablecasting" to mean:

"Programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator."

This case concerns "origination cablecasting" and it is the first case to reach the Court that involves any form of "cablecasting" at all. Signals carried by means of "cablecasting" originate and terminate in a coaxial cable, and thus—unlike the Class I signals passed upon by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)—they make no use of the radio spectrum at all.

The FCC regulations at issue in this case (Pet. App. C, p. 53)³ purport to require cable systems having 3,500 or more subscribers to engage in origination cablecasting as a "local outlet" for "local production and presentation of programs." There is nothing in these regulations, or in the findings and conclusions adopted by the FCC in its *First Report and Order*, 20 F.C.C. 2d 201 (1969) (Pet. App. C, pp. 31-53), which requires or anticipates that such cablecasting will cross state lines.

Cable systems subject to the regulations are authorized to solicit commercial sponsorship and are adjured to behave in every respect as if they were broadcasters: subject to the equal-time, fairness-doctrine, and other restrictions developed by the FCC to deal with the spectrum limitations of over-the-air broadcasting. The FCC found and determined that *allowing* "origination cablecasting" would

³ These regulations were at first suspended pending review by this Court, but have now been reinstituted to take effect March 31, 1972, with some alterations in wording. Cable Television Service, op. cit. supra, §§ 76.201-76.221. See p. 12, infra, and the Appendix to this brief, p. A4.

not be unfairly competitive with the operations of its television broadcast licensees, because both broadcasters and cable operators would "stand on the same footing" in acquiring the program material with which they compete." *First Report and Order, supra*, para. 5 (Pet. App. C, p. 33). The FCC did not find that requiring "origination cablecasting" by cable operators was necessary to protect the operations of broadcast licensees.

At the very close of its *First Report and Order* (Pet. App. C, p. 53), the FCC stated without elaboration of reasons that it was preempting State and local regulation "inconsistent with these Federal regulatory policies." And in its *Clarification of First Report and Order* issued shortly thereafter, 20 F.O.C.2d 741 (1969), the FCC ruled that this preemption covered local ordinances forbidding systems with fewer than 3,500 subscribers to engage in cablecast origination or to carry advertising—because such ordinances, even though not in direct conflict with the FCC regulations, were "inconsistent with Federal regulatory policies."

In its opinion setting aside these regulations as beyond the Commission's statutory authority, the Court of Appeals for the Eighth Circuit observed that cable operators obtain their licenses or franchises from state regulatory boards or municipalities; that Congress has made no attempt by legislation to preempt such authority; and that "problems arise with respect to encroachment on state and municipal rights . . ." (Pet. App. A, p. 22).

SUMMARY OF ARGUMENT

Basic to the FCC's "cablecasting" regulations is its determination that cable communications is a unitary enterprise which is to be regulated in its entirety by the

FCC as an appendage to broadcasting. As applied to "Class I" cable services of the sort involved in the cases previously brought before this Court—that is, the simple reception and delivery of off-the-air broadcast signals—there may be nothing exceptionable about this determination. As applied to the far more important and burgeoning origination and two-way services of which cable is capable; however, this determination may be disastrously in error and could preclude the realization of social values of the highest importance.

At stake in this issue are fundamental values of competition and free speech, as well as the genius and traditions of our federal system. We repeat here what we testified to the FCC; namely, that cable communications present the first opportunity in a lifetime to 'get away from the system of paternalism that has heretofore characterized mass communications in this country; and further, that there is neither need nor occasion to risk a single and pervasive federal error in addressing this opportunity.

Illinois' own hearings and investigations over the past year and more have strengthened this opinion. The coaxial cable grid that is laid down for cable television is capable, with the incorporation of suitable switching and terminal equipment well within the range of engineering feasibility, of affording opportunities both to receive and to transmit a whole new range and diversity of video, audio, and data-grade message services over the cable. Message origination and two-way, interactive communication opportunities can be opened up for elements in our society that are now excluded as a practical matter from participation in the marketplace of ideas. This is far too important a development to entrust to a single federal agency,

at least without the most careful and searching review and authorization by the Congress.

Treating cable operations for all purposes as an adjunct to broadcasting, susceptible to pervasive federal jurisdiction, would leave the important growth segment of those operations to struggle for uncertain acceptance within the existing broadcasting industry rather than through a newly separate and competitive communications structure. This in itself would place an intimidating chill on the innovative development of advanced cable communication services. More particularly, treating local cable origination as itself a broadcasting operation would clamp onto that origination all the paternalistic devices—the fairness doctrine, equal time, etc.—that have been forced onto over-the-air broadcasting by the spectrum limitations of that wholly different medium. Furthermore, it would subject the cable operator to advertiser control and reward, giving him an economic interest in the audience development of his own channel at war with his incentive to develop to the full other channels and services for community enrichment.

There is an entirely other way to approach the promise and potential of cable origination and two-way services. That is to treat the cable operator for these purposes as simply a carrier, separating if you will the medium from the message. Historically this has been the consistent approach taken at both State and federal levels to wired telecommunications in this country, through regulatory policies that leave no control over message content with the carrier. Control in this scheme of things is left solely to the senders and receivers of messages, subject only to the non-prior-restraints of the criminal law. This is common carriage, and it is essentially the system of regulation for

non-broadcast cable services selected after searching inquiry by the State of Illinois.

For present purposes this Court need not decide whether that selection is necessary or incumbent for the FCC within its Congressionally delegated domain of authority over interstate and radio communications. That is a matter for further consideration by the FCC itself, and the Congress. All that this Court need decide is that the choice made by Illinois and other States is permissible, within their domain of authority over intrastate, non-radio (wired) communications. Because local cable origination in its present state of development is an intrastate form of wired communications (as the FCC itself has recognized, *Common Carrier Tariffs for CATV Systems*, 4 F.C.C. 2d 257, 260 (1966)), that conclusion will lead to invalidation of the rule at issue in this case.

Section 2(b) of the Federal Communications Act of 1934, in conjunction with section 301 of that Act, withholds from the FCC "jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication services by wire . . . of any carrier. . . ." The term "carrier" is defined in Section 3(h) so as to exclude broadcasters but include carriers by wire, which are subdivided into (1) those engaged "in interstate or foreign communication"; and (2) all others, "where reference is made to common carriers not subject to this chapter." Section 221(b) illustrates the operation of this distinction as applied to telephone exchange services, none of whose practices, services, etc. fall within the FCC's jurisdiction "even though a portion of such exchange services consists of interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority." This statutory scheme is

the outgrowth of a long-established tradition leaving to State and local governments the authority to regulate intrastate wired communications services, notwithstanding that the physical plant used to provide such services is also employed in the furnishing of interstate services over which the federal government has assumed jurisdiction. See, *e.g.*, the Mann-Elkins Act of June 18, 1910, ch. 309, 36 Stat. 539, 545; *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 150-51 (1930).

Nothing in any previous decisions of this Court authorizes a departure from that tradition as regards services provided by broadband cable systems. The Congress has consistently declined to confer plenary jurisdiction over such systems on the FCC. And the White House Office of Telecommunications Policy, speaking for the Administration, has formally informed the Congress that the FCC's regulations dealing with local cable services and the division of federal-State authority over such services, "are predicated on unclear authority and address issues of major national concern", which will require "thorough Congressional review" on the basis of legislative proposals to be made by a Cabinet Committee created by the President. (See Appendix, pp. A12-A15.)

Numerous States have now adopted or are in the process of considering legislation and regulations treating broadband cable communications as a public utility. Their authority to do so was upheld by this Court in *TV Pix, Inc. v. Taylor*, 396 U.S. 556 (1970), affirming 304 F. Supp. 459 (D. Nev. 1968), to the extent not validly preempted by authorized regulations of the FCC. As was held by the three-judge District Court in that case (304 F. Supp., at 463), in the regulation of cable systems "national uniformity is probably not a possibility, let alone an accept-

able ideal." The Illinois Commerce Commission, for example, has concluded on the basis of detailed findings from an evidentiary record covering more than four months of hearings, that cable services are functionally equivalent to telephone services for the purpose of State regulation; and it is proposing to require that message origination and reception services be made broadly available for public use without content control of those messages by the cable operator. (See Appendix, pp. A16-A21.)

The FCC has made no findings and assigned no reasons that would justify its intrusion upon, or interference with, this sort of State regulation. Its attempt to link local cablecast operations, over which it has no authority, with carriage of television broadcast signals, over which it does have authority, is a form of "unstatutory condition" exactly akin to the "unconstitutional conditions" consistently struck down by this Court. See *Frost & Frost Trucking Co. v. R.R. Commission of California*, 271 U.S. 583, 593 (1926); *Sherbert v. Verner*, 374 U.S. 398, 404-406 & n.6 (1963); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595, 1609 (1960). To be valid, the purported condition must itself fall within the scope of the FCC's Congressionally delegated authority, which it does not do. Further, even assuming that the FCC could regulate intrastate wired communications upon a finding of adverse effect upon interstate or radio communications subject to the Commission's supervision, the FCC has made no such findings to support its "origination cablecasting" regulation. Quite the contrary, it has found that cablecasting should be permitted despite its competitive effect on television broadcasting. Permission and requirement are, of course, two very different matters.

If any confusion or inconvenience should arise as a result of disparate State and federal regulation of the

intrastate and interstate operations of cable systems, "these considerations are for the practical judgment of Congress in determining the extent of regulation necessary . . . to conserve and promote the interests of interstate commerce." *The Minnesota Rate Cases*, 230 U.S. 352, 432 (1913). What must be stressed in this case is that due recognition of State regulatory competence will *not* produce or permit the chaotic interference of over-the-air radio broadcast signals that led the Congress to confer centralized jurisdiction in the FCC over radio communications. Compare § 301(d) of the Federal Communications Act, vesting exclusive federal authority over intrastate radio communications "when interference is caused by such use or operation" with the transmission or reception of interstate radio communications. The Congress has sanctioned no such unified federal authority over intrastate wired communications, and the FCC should not be permitted to disturb that judgment until and unless the Congress directs it to do so.

ARGUMENT

I.

THE FCC REGULATIONS WITH RESPECT TO LOCAL ORIENTATION CABLECASTING CONFLICT WITH RULES GOVERNING LOCAL CABLECAST SERVICES THAT HAVE BEEN AND ARE BEING DEVELOPED BY STATES SUCH AS ILLINOIS.

In its Notice of Proposed Rule Making adopted January 5, 1972, the Illinois Commerce Commission addressed itself among other things to the non-broadcast services to be provided over cable systems. In pertinent part, the Notice proposed (Appendix, p. A22-A23):

"First, either separately or in conjunction with local program origination, one channel should offer passive display services on a continuing 24-hour basis: time and weather and the day's program log on all channels, both broadcast and nonbroadcast, at a minimum. These passive displays may also carry advertising on the top or bottom half of the screen. Second, the cable operator *may* offer its own local programming, over the same or one different channel, but only on a non-profit basis; that is, the sum total of any advertising revenues it earns in connection with such programming must recover no more than its direct costs. The Commission's concern here is to avoid giving the cable operator a proprietary interest in its own programming that could conflict with the public interest in promoting widely diverse programming opportunities on the other cable channels. It should be noted that the FCC's local origination requirement has been suspended pending the outcome of the *Midwest Video* litigation previously referred to; and in any case its definition of 'cablecasting', namely programming 'originated by the CATV operator or by another entity',

can be satisfied by ensuring adequate local access to free or leased channels as described below. This Commission does not believe that either the 'equal time' or 'fairness' provisions of FCC regulations are properly applicable to cablecast programming, so long as ample channel capacity is provided over public-access and leased channels to accommodate all points of view."

There are several respects in which these proposed rules may be found to conflict with the origination cablecasting regulations adopted by the FCC. First, the Illinois Commission is proposing that operators "may" engage in their own programming, not "must"; this would appear to run afoul of the FCC's own view of its preemption powers, as indicated in its *Clarification of First Report and Order*, 20 F.C.C. 2d 741 (1969). Second, the Illinois Commission's suggestion that local cablecasting can be carried out by entities other than the operator would circumscribe the choice that the FCC indicated must be left to the operator; in any event, the FCC definition has since been changed so as to specify that "origination cablecasting" must be "subject to the exclusive control of the cable operator." Cable Television Service, 37 Fed. Reg. 3252, § 76.5(w). Third, the limits proposed by the Illinois Commission on advertising revenue find no counterpart in the FCC regulations—which, despite their confinement of advertising to "natural breaks" in the cablecast, are still clearly designed to give the cable operator a revenue incentive to engage in its own programming. Finally, of course, the Illinois Commission proposal that neither the "equal time" or "fairness" provisions of FCC broadcast regulations is properly applicable to cablecasting over a diversity of channels squarely conflicts with the FCC regulations imposing these and other broadcast-type

restrictions on "origination cablecasting". (Pet. App. C, pp. 53-55; Cable Television Service, 37 Fed. Reg. 3252, §§ 76.205-76.221).

The Illinois Commission did not adopt its proposals out of a spirit of contrariness; rather, it fashioned these proposals out of a searching investigation of the nature and potential of this new medium of communications, calling in the process on the assistance of the best-qualified experts it could find throughout the country. It is now a commonplace that cablecasting provides an economy of abundance in contrast to the economy of scarcity dictated by the spectrum limitations of over-the-air broadcasting. See, *e.g.*, *On the Cable: The Television of Abundance* (Report of the Sloan Commission on Cable Communications, 1971), pp. 42-46. Given adequately abundant and reliable channel capacity on the cable, the incremental costs of providing origination opportunities are very low indeed as compared with broadcasting. This opens up a new medium of communications for minority interests of various sorts—ethnic, cultural, economic, and political—heretofore excluded as a practical matter from access to the advertised-supported mass medium. All points of view can be presented without artificial attempts at balancing of presentations on a single channel. The costs of reaching electoral constituencies on cable channels—without also reaching, and paying for, non-constituents as is now the case on broadcast television—can also be brought within the grasp of any candidate.⁴

4. Cablecasting, in other words, provides an unparalleled opportunity to escape from the practical limitations on freedom of speech that this Court has long recognized to be associated with broadcasting:

"Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is

Against this background the Illinois Commerce Commission could reasonably propose, as it has, that cable operators should not be confronted with a conflict of interest between the origination opportunities they can thus make available as carriers, and the revenues they might themselves gain as programmers. A great deal of market testing remains to be carried out before the full panoply of commercially feasible cablecast services can be determined, and this will require innovative service experimentation on the part of program and service suppliers of all sorts, as well as hospitality to such experimentation by cable operators. See "New Cable Services—A Step Nearer", January, 1972 release by Arthur D. Little, Inc. (Appendix, pp. A35-A37). The Illinois Commission could reasonably judge that the removal of disincentives to market development of new cable services would be in the public interest.

The Illinois Commerce Commission's proposals in this respect must be viewed in the context of established objectives of State public utility regulation. The Illinois Public Utilities Act, for example (Ill. Rev. Stats., Ch. 111½), vests the Illinois Commission with general supervisory jurisdiction over public utilities (Sec. 8); prohibits preferences or unreasonable differences in "charges, facilities, services, or in any other respect" (Sec. 38); entrusts the Illinois Commission to fix upon adequate, just, and reasonable practices, equipment, facilities and services (Sec. 49); authorizes the Commission to order improvements, additions or changes in plant and facilities in order "to secure adequate service or facilities" (Sec. 50); and empowers the Commission to establish standards for the

its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied."

National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943).

quantity and quality of services (Sec. 54). In pursuit of these legislative guidelines, the Illinois Commission has proposed a variety of rules for the regulation of local cablecast services—as to the number and configuration and expansion of cable channels and associated equipment, the provision of two-way capacity, and the furnishing of particular cable services such as channels for local government and school-system use—which overlap and to some extent very probably conflict with the “Federal regulatory policies” on these matters adopted by the FCC. Compare Illinois Commerce Commission Notice of Proposed Rule Making (Appendix, pp. A22-A31), with Cable Television Service, 37 Fed. Reg. 3252.

Such regulatory challenges to federal intrusion are inherent in State public utility regulation, which concerns itself with the non-discriminatory offering of adequate local services for public use. The challenge is posed not just by Illinois but by the seven other States which, like Nevada (whose statute was sustained by this Court in *TV Pix, Inc. v. Taylor*, 396 U.S. 556 (1970)), have adopted or construed public-utility legislation to apply to cable television;⁵ by the four States which, like New York, have imposed or obtained consent to a moratorium on cable activity pending adoption of statewide laws;⁶ and by at least the twenty-one additional States which were actively considering legislation by the close of 1971.⁷ This growing array of States concerning themselves with public utility regulation of cable systems marks a significant change in the situation as described to this Court in *United States*

5. Conn. Gen. Stats., ch. 289, secs. 16-330 through 16-333; Mass. Laws, ch. 1103 (1971); Nevada Rev. Stats., sec. 711.010 et seq.; R. I. Gen. Laws, sec. 39-19-1 through 39-19-8; Vt. Stats. Ann., tit. 30, ch. 13; Opinion of Hawaii Attorney General, Dec. 1, 1969, [1969] State Util. L. Rep. § 21,206. The Alaska Public Service Commission has also advised the General Counsel of the National Association of Regulatory Utility Commissioners that it has adopted statewide regulation of cable television.

v. *Southwestern Cable Co.*, 392 U.S. 157, 163 n. 15 (1968), when only two States, Nevada and Connecticut, were said to be regulating cable systems.

The public policy importance of this development cannot be overstated. As phrased by the White House Office of Telecommunications Policy, the nature of regulations adopted with respect to cablecasting, including in particular the division of federal-State authority over broadband cable services, "will shape the economic structure, and indeed the character, of the new medium." (Letter to the Chairman of the Senate Commerce Subcommittee on Communications, November 15, 1971; Appendix, p. A15.) To the extent that the States are permitted through public-utility regulation to foster the development of local communications services over cable systems, the way can be opened to realization of the promise of a brand new and diversified communications medium. If, on the other hand, the whole of cable communications is subjected to pervasive FCC jurisdiction, as somehow "ancillary" to its responsibilities for the promotion of mass-audience broadcasting, the local-service growth segment of cable communications may be placed permanently at the sufferance of the broadcasting industry. Even the most cursory review of the record of FCC proceedings with respect to cable television over the past decade will reveal how unremitting has been the opposition of broadcasters to each small advance in the latitude afforded cable systems. See, e.g., *Second Report and Order*, 2 F.C.C. 2d 725 (1966); *Notice of Proposed Rule Making and Inquiry*, 15 F.C.C. 2d 417 (1968); Cable Television Service, Appendix D, 37 Fed. Reg. 3252, 3341 (1972) (industry "consensus agreement")

6. N.Y. Laws, ch. 419 (1971); N.J. Laws, ch. 221 (1971). Wisconsin and the District of Columbia have adopted voluntary moratoria.

7. Tabulation compiled by the office of General Counsel, National Cable Television Association, on the basis of a countrywide daily news clipping service. Three more States have been added to the list thus far in 1972, leaving only 14 States that are not currently concerning themselves with the issue.

imposing program-exclusivity restrictions on the distant-signal importation rights proposed by the FCC). In such a regulatory environment, the incentives to local service innovation over cable systems could be severely curtailed.

II.

STATE RATHER THAN FEDERAL REGULATION OF LOCAL CABLECAST SERVICES ACCORDS WITH THE TRADITIONAL ALLOCATION OF COMPETENCE OVER WIRED COMMUNICATIONS AS BETWEEN STATE AND NATIONAL GOVERNMENTS.

In *TV Pix, Inc. v. Taylor*, 304 F. Supp. 359 (D. Nev. 1968) (three-judge court), *aff'd mem.*, 396 U.S. 556 (1970), State public-utility regulation of cable television systems was upheld against assaults based on the Commerce Clause and the Due Process Clause of the Fourteenth Amendment, as well as alleged Congressional preemption of the field. The court held that cable television is a local business involving services to local residents through cables strung over local streets and ways. Although a cable system may be engaged in the interstate transmission of broadcast television signals,

"... in its impact on interstate commerce, [it] is analogous to a local express or parcel delivery service or a local pilotage or lighter service organized to facilitate the final interstate delivery of goods to the named consignee. Appropriate state regulation of such primarily local facilities or services in interstate commerce, in the absence of federal legislative intervention, is not proscribed by the Commerce Clause of the Constitution. *Cooley v. Board of Wardens*, 1851, 12 How. 299. . . ." (304 F. Supp., at 463.)

The court further held that public-utility regulation of cable rates and services was not a matter requiring na-

tional uniformity: "National uniformity is probably not a possibility, let alone an acceptable ideal." (*Ibid.*) Against this background it held that State regulation even of matters having to do with interstate transmission was not preempted by the Federal Communications Act, although the FCC might by valid regulation supersede a state regulation "in actual conflict" with it.

The *TV Pix* case dealt only with interstate delivery of television broadcast signals. It thus had no occasion to consider whether the FCC had or could preempt regulatory authority over intrastate cablecasting. The same is true of *United States v. Southwestern Cable Co.*, in which this Court observed that the cable system there before it did not engage in cablecast programming, 392 U.S., at 162 & n. 9; and also of *Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968), which did "not deal with program origination" over cable systems (at 392 n. 6). The question presented in this case is thus one of first impression as regards cable television — though by no means a novel question in the history of wired communications.

To appreciate the tradition and appropriateness of State concern with intrastate wired communications, it may be helpful briefly to recite the Illinois Commerce Commission's own involvement in this subject. Ever since 1913, that Commission or its predecessor has been entrusted with public-utility supervision over "the transmission of telegraph or telephone messages within this State." (Ill. Rev. Stats., ch. 111½, § 10-3(b).) In its proceedings culminating in the Interim Opinion and Order of September 9, 1971 (excerpted in Appendix, p. A16), the Illinois Commerce Commission conducted a searching inquiry into the similarities and differences between telephone and broadband-cable messages. Over the course of four months of hear-

ings, it sought out and questioned the best-qualified experts it could find in the fields of law, and engineering, and finance, and marketing. These experts came from all over the country, from Canada, and from England, and they testified to the Commission at length rather than in the snatches of time made available by the FCC.⁸ On the basis of the extensive record thus compiled, and its own regulatory experience, the Illinois Commission found that "telephone . . . messages" subject to its jurisdiction had expanded in practice to cover voice, data, telemetry, picture phone, and television transmissions — or what it called "total telecommunications" services. The Commission further found that broadband cable systems are functionally equipped to provide at least the same range and diversity of services; that they will have to compete with telephone companies for long-range financing in the same financial markets; and that the technical method of operation of the two industries is closely parallel. As a result, it determined that both industries should be regarded as subject to the same general scheme of State public-utility regulation. The Commission, in other words, developed exactly the same kind of expert findings and conclusions with respect to State regulatory jurisdiction as were recently approved by this Court in *Federal Power Commission v.*

8. Examples are: Peter Goldmark, then CBS Laboratories president and inventor of color television and the video cassette, half a day; Paul Kagan, publisher of the leading cable industry financial newsletters "Cablecast" and "Datacast", a full day; Robert Brooks, cable engineering consultant with 18 years' experience in the business, three and a half days; Stephen Barnett, communications law expert and consultant to the Sloan Commission among others, half a day; Ralph Gabriel, chairman of Rediffusion, Ltd., London, which has developed dial-access cable systems, half a day; and leading engineers, economists, and lawyers from the fields of broadcasting and telephony as well as cable television. The first three named witnesses were not invited to testify before the FCC's March 1971 comprehensive hearings at all, while the others were restricted to five- or ten-minute presentations.

Florida Power & Light Co., —U.S.—, 40 U.S. Law Week 4141 (Jan. 14, 1972) with respect to federal regulatory jurisdiction.

What remains is accommodation of the reach of State and federal jurisdiction when, as here, they are asserted to conflict. Section 90 of the Illinois Public Utilities Act (Ill. Rev. Stats., ch. 111½, § 94) provides for such accommodation by declaring its inapplicability to interstate and foreign commerce "except to the extent permitted under the provisions of the Constitution of the United States and Acts of Congress, and the applicable decisions of the Supreme Court of the United States." We already know that the Commerce Clause of the Constitution does not of its own force prohibit State regulation of intrastate wired communications, even when such communications are an integral extension of interstate commerce. *TV Pix, Inc. v. Taylor*, 396 U.S. 556 (1970). It therefore becomes necessary to inquire what Congress and this Court have traditionally recognized to be the appropriate division of authority over wired communications. And there is no more pertinent history for this purpose than the history of telephone regulation.

State regulation of telephone services long preceded federal regulation. State regulatory commissions were exercising jurisdiction over intrastate message services, which was then and still is the lion's share of the business, for more than a quarter of a century before Congress vested effective regulatory authority in the FCC. See Gabel, *Development of Separations Principles in the Telephone Industry* 16-26 (1967).⁹ And when it did so, it took care

9. By 1917 all but three of the States had vested regulatory power in their public utilities commissions over rates and practices of telephone systems. H. Rep. No. 109, 67th Cong., 1st Sess., p. 3 (1921).

to preserve State authority over the intrastate aspects of the business.

There is in fact a long tradition of Congressional deference to State regulation of intrastate services, including telecommunications services, in the various Interstate Commerce Acts that preceded the Federal Communications Act of 1934. See *The Minnesota Rate Cases*, 230 U.S. 352, 417-19 (1913). Typical is the proviso in the Mann-Elkins Act of June 18, 1910, ch. 309, 36 Stat. 539, 545: "Provided, however, That the provisions of this Act shall not apply to the . . . transmission of messages by telephone, telegraph or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid." This negation of federal authority was carried forward and continued in section 2(b) of the Federal Communications Act of 1934, as amended, 47 U.S.C. § 152(b), which provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication services by wire or radio of any carrier. . . ."

To be sure, this separation of authority has caused and is causing practical difficulties with respect to sorting out the interblending of operations in the conduct of interstate and local business by interstate carriers. See *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 150-51 (1930); Gabel, *op. cit. supra*, *passim*. But this is the price of preserving a healthy federal system. As stated by Justice Hughes in *The Minnesota Rate Cases*, *supra*, 230 U.S., at 431: "... our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency."

The same division of authority is fully applicable to broadband telecommunications, employing video as well as audio and data-grade signals. Apart from the carriage of

broadcast signals, which are interstate and incidental to radio communications—hence within the authority of the FCC as held by this Court in *Southwestern Cable*—the message services to be performed by cable systems are predominantly local and intrastate in character. This is true of meter-reading, of community program origination, of library information retrieval, of one-way and two-way instructional services, of cable conferencing between branches of a business or a university, of tele-shopping, indeed of virtually all the services that are anticipated. Eventually interstate links may be developed for cablecasting, and these will be appropriate for federal regulation either by a fresh grant of statutory authority or through a finding by the FCC—comparable to the finding by the Illinois Commerce Commission—that broadband cablecasting is a form of interstate common carrier service. We have had no such federal finding or legislation to date.

III.

NOTHING IN THE FEDERAL COMMUNICATIONS ACT OR THE DECISIONS OF THIS COURT PURPORTS TO ALTER THIS TRADITIONAL DIVISION OF AUTHORITY AS REGARDS INTRASTATE CABLECAST COMMUNICATIONS.

As previously indicated, none of the cable television cases previously decided by this Court has involved cablecasting. Each has focused instead exclusively on the carriage by cable systems of off-the-air broadcasting. The dicta in this Court's opinion in the *Southwestern Cable* case, referring to the "unified jurisdiction" and "broad authority" of the FCC, must be read in this context; for the Court first found and determined that the carriage of broadcast signals was a form of "interstate and foreign

communication by wire" within the meaning of Section 2(a) of the Communications Act. The present case of course involves not interstate broadcast signals, but intrastate cablecast signals that fall within the scope of Section 2(b) of the Act disclaiming federal jurisdiction.

The FCC was given an exceptional grant of "broad" and "unified" jurisdiction over radio (and television) broadcast signals in Section 301(d) of the Act, which is the only provision in the statute conferring authority over wholly intrastate communications. This was done to avoid the problems of signal interference peculiar to over-the-air broadcasting. Radio broadcasting is also singled out for exceptional treatment in Section 3(h), which provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." Neither of these special provisions is made applicable to wire communications.

It was to protect the exercise of the FCC's exceptional authority over radio broadcasting that this Court in *Southwestern Cable* upheld that Commission's jurisdiction over cable television systems, insofar as they engage in interstate reception and delivery of such broadcasting. The brief presented for the United States stipulated that the FCC was asserting authority only over the carriage of broadcast signals by cable systems.¹⁰ This Court's holding was correspondingly confined to a recognition of FCC authority under Section 2(a) of the Act; and even this authority was expressly "restricted to that, reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcast-

10. Brief for the United States and the Federal Communications Commission in *United States v. Southwestern Cable Co.*, No. 363, O.T. 1967, p. 42.

ing." 392 U.S., at 178. The Court intimated no view as to the authority, if any, of the FCC to regulate cable systems under any other circumstances or for any other purposes.¹¹

In its subsequent *Notice of Proposed Rulemaking and Notice of Inquiry* proposing the cablecast origination rules at issue in the present case, the FCC made clear that it did not consider its authority to adopt such rules had been settled by *Southwestern Cable*. It stated that in proposing these rules, "the Commission is clearly concerned with *new and important questions of policy and law* in the communications field, and would welcome congressional guidance as to policy and *legislation conferring direct general authority over CATV*." 15 F.C.C. 2d 417, 421 (Dec. 12, 1968) (emphasis added).

As this Court knows and indeed observed in *Southwestern Cable*, the Congress has never adopted legislation giving the FCC plenary authority over cable systems. (See 392 U.S., at 164-65 & nn. 19-22, and at 170-71 & nn. 30-31). The FCC tried to obtain such authority in 1959 and again in 1966; in both cases legislation was reported out of committee but failed to gain floor approval. The 1966 legislation, significantly, would have amended Section 3(h) of the Communications Act to provide that "a person engaged in radio broadcasting *or in operating a community antenna system* shall not, insofar as the person is so engaged, be deemed a common carrier." H. Rep. No. 1635, 89th Cong. 2d Sess. (1966) (amendment in italics). That did not pass; and neither has the latest Commission legislative proposal, which would add a new Section 331 to the Act giving the Commission rulemaking au-

11. The earlier decision of the court of appeals in *Buckeye Cablevision, Inc. v. Federal Communications Commission*, 387 F. 2d 220, 224-25 (C.A.D.C. 1967), was similarly limited in scope and effect.

thority over "multiple reception, *origination* and related services" performed by cable systems. S. 792, 92nd Cong. 1st Sess. (1971) (emphasis supplied). (See Appendix, p. A33.)

While Congressional inaction may lack dispositive significance in relation to FCC regulation of interstate communications,¹² which are already covered by Section 2(a) of the Act, it surely must be treated as significant in relation to intrastate communications which historically have always been exempt from federal regulation under Section 2(b) of the Act and predecessor statutes. The plain fact is that without new legislative authority the FCC simply does not have power to regulate such communications.

This much has been recognized by the communications-policy spokesman of the Executive branch, albeit in diplomatic language. On November 15, 1971, the Director of the White House Office of Telecommunications Policy, who is also acting as Chairman of a Cabinet Committee established by the President to formulate policy with respect to broadband cable communications, responded as follows to a request from the Chairman of the Senate Commerce Subcommittee on Communications for comment on the FCC's cablecasting regulations:¹³

• • • • •

Turning now to those aspects of the proposals which go beyond the conditions of cable retransmission of over-the-air signals, relating to broadband cable as a communications medium in its own right: These aspects of the proposed rules (together with existing rules and further contemplated rulemakings) involve such matters as Federal preemption of state and local

12. See *United States v. Southwestern Cable Co.*, *supra*.

13. The full text of the letter appears in the Appendix, p. A12.

control, the extent of FCC supervision of programming, limitations on numbers of channels, flexibility with respect to new services, and prescribed channel usage. These and other matters of like importance will shape the economic structure, and indeed the character, of the new medium. They are the subject of the Cabinet Committee's work and will ultimately require careful Congressional consideration. The Commission itself has noted that the recent *Midwest Video* case casts doubt upon the legality of this type of regulation, and it has requested Congressional clarification. Similarly, we believe the 1934 Communications Act provides inadequate guidance for the regulation of broadband cable communications. Therefore, while we favor immediate implementation of the proposed rules in order to permit the growth of cable television, our recommendation is based upon the hope and expectation that Congress will address these fundamental aspects of broadband cable policy at an appropriate time, before the economics of the industry and the character of the medium have become irreversibly set in the mold contemplated by the Commission."

This Court can give the Congress an unfettered opportunity to consider appropriate broadband cable policy for the future, by making clear the division of authority over interstate and intrastate cable communications under the existing Federal Communications Act.¹⁴

14. We may dispose in footnote of two suggestions advanced by the FCC. One is that the enactment of copyright legislation as proposed by the FCC would ratify that Commission's jurisdiction to adopt all of its presently pending rules, including those relating to cablecasting. Cable Television Service, 37 Fed. Reg. 3252, para. 65(iii). Of course, the copyright compromise between industry groups, to which this refers, was worked out in the context of regulations dealing with permissible broadcast-signal importation and has nothing whatever to do with cablecasting or federal-State relations, *id.* para. 62. Furthermore, copyright legislation will issue if at all from a wholly separate committee than the one that exercises legislative oversight over FCC activities, see *id.* Appendix E. Similarly defective is the

IV.

THE FCC HAS MADE NO FINDINGS AND ASSIGNED NO REASONS THAT WOULD BRING INTRASTATE CABLECAST COMMUNICATIONS WITHIN ITS CONGRESSIONALLY AUTHORIZED SPHERE OF AUTHORITY.

The "purposes of the Communications Act", much referred to by the petitioners, do not extend to intrastate wired communications. According to Section 1 of the Act, 47 U.S.C. § 151, the overall objective was one of "regulating interstate and foreign commerce"; and the goal of extending wire and radio communication service broadly to all the people of the United States was to be achieved "by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication. . . ."

The Act centralized authority as among federal agencies but did not authorize invasion of the authority exercised by State agencies over intrastate wired communications.

One may agree, as the Illinois Commerce Commission has agreed, that cablecasting is in the public interest and should be promoted. But the purposes of the Communications Act do not in operational terms carry this far, and do not confer federal authority to require or regulate such communications. That is a matter for the States. See Sections 2(b), 3(h), 3(t), and 221(b) of the Act, 47 U.S.C. §§ 152(b), 153(h), 153(t), 221(b).

suggestion in the petitioners' brief (Pet. Brief, p. 13 n.10) that enactment of a campaign expenditure law — again issuing from a variety of committees and governing expenditures for all media including newspapers and billboards — somehow translates into plenary federal jurisdiction over broadband cable communications.

The conditional form in which the FCC's cablecasting regulations are couched does not save them from invalidity. The FCC of course has authority to grant or deny distant broadcast-signal importation by cable systems, *United States v. Southwestern Cable Co.*, *supra*. But to grant importation rights on conditions relating to matters beyond the agency's authority is the exercise of a greater power rather than a lesser. See Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595, 1609 (1960): "The power to impose conditions is not a lesser part of the greater power to withhold, but instead is a distinct exercise of power which must find its own justification. In the area of regulation, withholding and licensing with conditions are alternative instruments for the regulation of conduct. . . ." This is indeed the teaching of this Court's own decisions, which have consistently recognized that conditional regulation involves not a single power but two separate powers each of which must stand on its own footing. In form, the conditional regulation appears to offer a choice. "In reality, the carrier is given no choice, except a choice between the rock and the whirlpool. . . ." *Frost & Frost Trucking Co. v R. R. Commission of California*, 271 U.S. 583, 593 (1926); accord, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404-06 & n. 6 (1963). An *ultra vires* condition is no less invalid for being a condition.¹⁵

15. Suppose the FCC were to consider "seminar" conference calls among members of community interest groups a desirable use of wired communications, and accordingly conditioned an interstate telephone rate increase by the Bell System upon simultaneous reduction in local exchange rates for such services. Would anyone contend that this was authorized? The fact is that the FCC has never presumed to dictate the intrastate disposition of earnings or savings on interstate telephone business created by its rulings. See Gabel, *Development of Separations Principles in the Telephone Industry* (1967).

Nor is the FCC's position aided by the "end use" theory it predicates on *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). In that case the question was whether the Power Commission could decline to certificate interstate transportation of natural gas because of inferior uses to which it would be put by the end consumer. The Commission's order was one over which it had clear statutory authority, the only question being whether it could act on the basis of reasons falling outside its jurisdiction. At most, the *Transcontinental* decision would authorize the FCC in the present case to consider whether and to what extent distant-signal authorization will be put to socially useful purposes by cable operators. The FCC in fact *has* considered that question, and has determined that the distant-signal authorization scheme it has developed "should serve to create an *incentive* for the development of those nonbroadcast services that represent the long term promise of cable television and are critical to the public interest judgment we have made." Cable Television Service, 37 Fed. Reg. 3252, 3260 (para. 60) (emphasis supplied). This is the furthest the FCC can carry *Transcontinental*; and, of course, incentives are very different from requirements.

Transcontinental is distinguishable from the present case in yet another important way. The "broader principle" on which the Court rested its judgment was the practical one of preventing a regulatory "no man's land":

"That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs." (365 U.S., at 19-20.)

The Court decided that consuming States could not be expected to deny themselves the use of natural gas that

would deplete the resources of producing States, and therefore upheld federal power. In our case, however: (1) we do not really have a borderline question; (2) the withholding of Congressional authority is quite explicit; (3) cablecasting is not an interstate transmission of resources originating in other States, but a purely local communication of messages originating and terminating within the same State; and (4) the interest and ability of State authority to create and administer a proper regulatory context for cablecasting actually exceeds that of the FCC.

At latest count there are in this country more than 2,500 cable systems in operation, a like number that are franchised but not yet in operation, and a somewhat greater number with franchise applications pending.¹⁶ The notion that a single federal agency, no matter how well intentioned, can supervise the local service adequacy of each of these systems, let alone adjudicate "fairness" and "equal time" complaints arising out of each, has about it something of the bizarre. The FCC regulations are likely to be observed mainly in the breach, if State and local governments are required to stand aside. There is no need for this to happen. State regulatory commissions and their staffs are quite accustomed and capable of assuring the adequacy of facilities and practices for local services such as message origination; and an increasing number of them are seeking to do just that.¹⁷ This Court should not sanction an illusory federal preemption that would leave local service needs inadequately attended.¹⁸

16. Pet. Brief, p. 19.

17. See p. 15, *supra*.

18. In its resolution of the issue of television broadcast signal carriage by cable systems, the FCC observed that its distant-signal program "melds techniques with which we have had experience—exclusivity and a limitation on the number of distant signals to be imported." Cable Television Service, 37 Fed. Reg. 3252, 3260 (para.

Other reasons advanced by the FCC after the fact, to justify its displacement of State and local authority over cablecasting, are no more persuasive. These are set forth in paragraph 130 of the opinion accompanying the FCC's just-adopted comprehensive cable rules (37 Fed. Reg. 3252, 3270):

"It is by no means clear that the viewing public will be able to distinguish between a broadcast program and an access [i.e., cablecast] program; rather, the subscriber will simply turn the dial from broadcast to access programming, much as he now selects television fare. Moreover, leased channels will undoubtedly carry interconnected programming via satellite or interstate terrestrial facilities, matters that are clearly within the Commission's jurisdiction. Finally, it is this Commission that must make the decisions as to conditions to be imposed on the operation of pay cable channels, and we have already taken steps in that direction. (See § 76.225). Federal regulation is thus clearly called for."

For these reasons, and because "a dual form of regulation would be confusing and impracticable" (para. 131), State and local regulation of cablecast channels is to be precluded.

We may consider each of these purported reasons in turn.

Generally speaking, it is true that both broadcast and cablecast programming will be received by the subscriber

59). The FCC has, of course, had no experience with regulation of local service cablecasting. This is not to suggest that the FCC may never experiment with new regulatory ventures in fields over which it has authority; it is just that the balance of experience, insofar as that is a pertinent consideration, favors State regulatory commissions rather than the FCC.

on the same cathode ray tube;¹⁹ for regulatory purposes, however, this is irrelevant. Provision of telephone services also involves the use of a single physical plant interchangeably for both local and interstate services. This is most obvious in the case of the telephone handset itself. The subscriber has no idea when he picks up the telephone whether the message will be local or interstate. (By contrast, the cable subscriber can choose for himself whether to select a channel carrying a broadcast signal or to dial for a locally-originated program or other service.) But the telephone plant is even more extensively interchangeable—land and buildings, circuit equipment, local dial and other switching equipment, station equipment, outside plant, and general equipment are all used for both local and interstate services. Yet they are subject to dual regulation by federal and State governments on the basis of interstate vs. intrastate use. Gabel, *op. cit. supra*, at 140-143.

The same is again applicable to cable systems. The antennas mounted on the system's tower to capture broadcast signals are not employed in local cablecast services. But the control office and coaxial cable grid—comprising cables, amplifiers, drop wires, and the home terminal itself—are all used or useful in both local and interstate services. In the field of wired communications, this Court has long recognized the necessity to preserve separate State and federal regulatory authority notwithstanding the intermingling of property for these two uses. *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 150-51 (1930) (Hughes, C.J.).

19. Home terminal equipment designed exclusively for cablecasting—such as two-way monitoring and control devices, unscrambling controls, and program-ordering dials or keyboards—are now being engineered and in some cases produced. None of these has any foreseeable application to broadcast programming.

As to interstate connections for cablecast programming via satellite, microwave, or interstate cable, if and when such instrumentalities are developed it is true that federal regulatory authority will attach to *them*. But that authority would still not extend to local cablecast services *per se*. In any event, nothing in the regulations at issue in this case turns on the presence or absence of interstate connections.

The FCC's pay cable regulations are not at issue in this case, although it may be noted that the Commission has authorized pay cable operations. Even here there is a serious question about the Commission's authority over a wholly local pay cable offering, such as a local performance of a play or sporting event carried over the cable. See Section 2(b) of the Federal Communications Act. But assuming that the Commission could grant or deny local pay cable offerings that it found would hurt its broadcast licensees, that would not confer authority to require or regulate local cablecast services in the absence of any finding that such operations are needed to protect broadcast stations.

Here we come to a critical second point in the overall argument. It is the basic position of the State of Illinois that the FCC lacks authority under the Federal Communications Act to regulate intrastate wired communications for any purpose. Even if this were wrong, and the FCC could concern itself with intrastate wired communications when they have an impact on its delegated responsibilities under the Federal Communications Act—itsself a highly dubious proposition, unsupported by anything in the Act or decisions of this Court construing it—the FCC has made no findings that would raise that issue for decision. It has not performed, in other words, the kind of

detailed jurisdictional fact-finding operation carried out for purposes of State law by the Illinois Commerce Commission and approved for purposes of federal law by this Court in *Federal Power Commission v. Florida Power & Light Co.*, —U.S.—, 40 U.S. Law Week 4141 (Jan. 14, 1972). This is a vital failing; for, as was held in *The Minnesota Rate Cases*, 230 U.S. 352, 419-20 (1913), when it is sought to extend federal authority or displace State authority in a particular regulatory area because of an asserted impact on established Congressional objectives, the federal administrative agency must make findings keyed to the federal statute in question. This the FCC has not done.

First, it is crystal clear that the FCC has not found local origination cablecasting to be a form of interstate communications. Quite the contrary: In *Common Carrier Tariffs for CATV Systems*, 4 F.C.C. 2d 257, 260 (1966),²⁰ the FCC acknowledged that, in addition to the carriage of television broadcast signals, channels leased by cable operators from the telephone system also carry locally originated signals:

"This means only that, as with most of the Bell System's communications facilities, the same facilities may be used jointly for both interstate and intrastate communications. This fact has no bearing on the interstate nature of the service in question except perhaps to emphasize the distinction between the two types of service and to strengthen the Commission's conclusion that the further transmission of the TV signals is interstate service." (Emphasis supplied.)

20. This was part of an overall FCC proceeding ultimately affirmed by the court of appeals in *General Telephone Co. of California v. Federal Communications Commission*, 413 F. 2d 390 (C.A.D.C. 1969) (per Burger, J.), cert. denied, 396 U.S. 888 (1969).

Of course, the fact that the same cable may carry both interstate and intrastate communications services does not, under the clear language of Section 2(b) of the Federal Communications Act, confer federal authority over the "intrastate communication service."

Second, it is equally clear that the FCC has not found cablecasting to be a form of radio broadcasting. Again, quite the contrary is the case. The FCC has consistently found and determined that cable systems are not engaged in "broadcasting" within the meaning of the Act, because their transmissions are carried by wire rather than by radio. *CATV and TV Repeater Services*, 26 F.C.C. 403, 428-29 (1959); *Cable Television Service*, 37 Fed. Reg. 3252, 3277 (para. 191). It is worth noting that this determination is a matter of engineering fact, not susceptible to changing policy influence or choice.

Third, the FCC has not found that local origination cablecasting is required to protect the competitive operations of its broadcast licensees — the kind of determination upheld by this Court, vis-a-vis interstate cable operations, in *Southwestern Cable*. Quite the contrary, it has found that cablecasting should be permitted despite its competitive effect on television broadcasting. *First Report and Order*, 20 F.C.C. 2d 201, para. 5 (1969). Permission and requirement are, once again, very different matters.

Finally, it is true that the FCC has consistently held that cable operations do not constitute common carriage. But this is not so much a finding of fact as it is a policy conclusion for which the FCC must find statutory authorization. The FCC has held that cable systems are not common carriers because it is the cable system that decides what broadcast signals it will carry. *CATV and TV Repeater Services*, *supra*, 26 F.C.C., at 427-28. We may note

even here that the appropriateness of this conclusion may have been strongly affected by subsequent FCC actions, in that the television broadcast signals that cable systems may and must carry are now regulated entirely by the FCC and not left to the operator's choice. Cable Television Service, 37 Fed. Reg. 3252, 3262-67 (paras. 74-106). The impact of this development on its earlier conclusion has to date not been considered by the FCC or by the courts which upheld the earlier conclusion. See, e.g., *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 359 F. 2d 282 (C.A.D.C. 1966).

But the important point is that the FCC's policy conclusions with respect to common carrier regulation, and the court decisions sustaining those conclusions, have rested solely on Class I cable services—the receipt and delivery of television broadcast signals. As this Court observed in *Southwestern Cable*, which concerned systems carrying only Class I signals, “the Commission and the respondents are agreed, we think properly, that *these* CATV systems are not common carriers within the meaning of the Act.” (392 U.S., at 169 n. 29) (emphasis supplied). We need not now consider whether the march of events has altered the propriety of even that conclusion as to broadcast signal carriage. What is clear is that to impose a like policy determination on local cablecasting—whose programming control as between the cable operator and its subscribers is not inherently ordained by anything in the nature of the enterprise—requires a grant of statutory authority over intrastate wired communications which the FCC simply does not possess.

The thesis advanced by the State of Illinois, in other words, is that to require a cable system to exercise exclusive programming control over “origination cablecasting”, and to encumber that system with broadcast-type regula-

tion, is to exercise a policy choice that has not been entrusted to the FCC. The State of Illinois, in company with other States, has opted for a different scheme of regulation which largely divorces carriage from programming and opens up local services to subscriber and user choice and control. The States' jurisdiction so to decide should be recognized and protected by this Court.

V.

ANY FRICTION OR INCONVENIENCE THAT MAY ARISE AS BETWEEN STATE REGULATION OF LOCAL CABLECAST SERVICES AND FEDERAL REGULATION OF INTERSTATE BROADCAST DELIVERY CABLE SERVICES IS A MATTER FOR RESOLUTION BY THE CONGRESS:

The FCC has complained of, and the petitioners' brief refers to, "overlapping and incompatible regulations" by State and local authority. (Pet. Brief, p. 21.) In the main, this appears to refer to haphazard local franchising practices, which both the Illinois Commerce Commission and the FCC have moved to correct. Notice of Proposed Rule Making, Section A3; Cable Television Service, part V (in which the quoted phrase is found).²¹ In this area the FCC has recognized, and is prepared to deal with the existence of dual regulatory jurisdiction, with the FCC prescribing minimum procedural guidelines and the States and localities filling in the details and issuing the licenses. This has laid the groundwork for a cooperative approach to licensing of cable systems, which the State of Illinois

21. Copies of both of these documents have, as previously mentioned, been lodged with the Clerk of this Court.

pects will provide a workable framework.²² The point for present purposes is that no issues relating to the licensing process are involved in the question presented by this case.

If there is any further friction or inconvenience arising from dual regulatory jurisdiction with respect to cable services, the FCC has failed to specify its nature. This is not surprising, since the FCC proceedings have been concerned mainly with broadcaster-cable disputes and not with the division of federal-State regulatory authority. As the FCC itself put it in presenting its comprehensive cable regulations: "The carriage of distant television broadcast signals by cable television systems has been center stage in the continuing controversy between the Commission, the Congress, and the Courts." Cable Television Service, 37 Fed. Reg. 3252, 3259 (para. 57). Certainly the States heretofore have had barely a wing of that stage, insofar as the Courts and the Congress are concerned. See, *e.g.*, Hearings before the Senate Commerce Subcommittee on Communications, Feb. 8, 1972 (in which the entire colloquy during an 85-minute discussion of the FCC's just-released comprehensive cable television regulations concerned the impact of distant-signal importation on broadcast stations, and not one question was explored about the regulations relating to cablecast services). With the exception of *TV Pix, Inc. v. Taylor*, 396 U.S. 556 (1970), in which this Court upheld State regulatory authority, no State has been heard by the Congress or this Court before the present case.

22. The Chairman of the Illinois Commerce Commission has been proposed for membership on a Federal-State Advisory Committee being created by the FCC to address practical accommodations of authority in the licensing area. 37 Fed. Reg. 3277 (para. 188); 37 Fed. Reg. 3204.

The petitioners nevertheless maintain that "the alternative to [Federal Communications] Commission regulation is the kind of fragmented regulatory pattern and chaotic development which characterized broadcasting in its early years and which led to the enactment of the Communications Act of 1934." (Pet. Brief, p. 20). This is demonstrably in error. "Chaos" occurred because of the physical properties of electro-magnetic radiation in the open atmosphere, creating interference between radio waves having similar frequency characteristics. It was this and this alone that caused the Congress to vest centralized jurisdiction in the FCC over radio broadcasting, extending even to intrastate radio communications because of their capacity to interfere with interstate broadcasting. Federal Communications Act, Section 301(d); *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-14 (1943). No such problem exists with transmissions confined within a coaxial cable, and Congress has accordingly never conferred regulatory jurisdiction on the FCC to deal with intrastate communications by wire. Federal Communications Act, Sections 2(b), 221(b).

It may be that the plan of the Act, assigning federal-State regulatory jurisdiction over wired communications depending on the interstate or intrastate character of the signals that are carried, could some day cause practical difficulties in application to cable television. But this has been true for more than 50 years with telephone communications and other comparable forms of carriage in which the physical plant is devoted to both interstate and intrastate operations; and the federal system has managed

tolerably well.²³ The whole question was extensively considered and resolved in Justice Hughes' landmark opinion in *The Minnesota Rate Cases*, 230 U.S. 352, 432 (1913). That involved railroad carriers whose rights of way, terminals, rails, bridges, and stations were all used interchangeably for intrastate and interstate operations. It was argued that this extensive interblending of operations made dual regulatory jurisdiction confusing and impracticable. To which Justice Hughes responded:

"... these considerations are for the practical judgment of Congress in determining the extent of regulation necessary ... to conserve and promote the interests of interstate commerce."

The same answer applies to the petitioners' contentions in this case.

A final, after-the-fact reason for the FCC's effort to displace State regulatory authority can be found in its assertion that this is the proper way of fostering service experimentation by cable systems. See *Cable Television Service*, 37 Fed. Reg. 3270-71 (paras. 131, 132). There are three answers to this. First, if the FCC obtains jurisdiction over all cable operations as somehow "ancillary" to broadcasting, this will allow the broadcasting industry to claim competitive injury whenever it wishes to stifle a new cablecast service — which scarcely seems conducive to cable innovation. Second, State regulatory commissions are much closer than the FCC to the varying service needs and interests of their communities and can be expected to do a

23. See Gabel, *op. cit. supra*, *passim*. The principal practical difficulties have related to the allocation of plant for the purposes of rate-base regulation. Neither the Illinois Commerce Commission nor the FCC is proposing such rate regulation of cable systems for the foreseeable future. Notice of Proposed Rule Making, Section A2; *Cable Television Service*, 37 Fed. Reg. 3276 (para. 183).

more effective job of promoting their realization.²⁴ Third, the most important area of experimentation that the FCC would foreclose is *regulatory* experimentation. What suits Illinois when it comes to local cablecast regulation may not exactly suit New York or Massachusetts or Minnesota. The federal system should tolerate and even welcome a degree of regulatory diversity on matters closely touching the kind and quality of local service in a dynamic field of evolving technology. For as Justice Brandeis pointed out in a related context, it is still

“... one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, ~~serve as~~ a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁵

The converse of this is that it would be gravely injurious to our healthy federal system for a single federal agency to arrogate to itself all decision-making with respect to the evolution of local services over a new communications medium—without at least the most searching Congressional review and authorization.

24. The Illinois Commerce Commission, for example, is proposing that Illinois cable systems conduct a triennial survey of business and community needs for new cablecast services, designed to ascertain and implement desires for inauguration of new services and installation of more sophisticated equipment. Notice of Proposed Rule Making, Section B4(d); Appendix, *infra*, p. A31.

25. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

WILLIAM J. SCOTT,
Attorney General

PETER A. FASSEAS,
Special Assistant Attorney General

ROLAND S. HOMET, JR.
Special Counsel

Counsel for the State of Illinois
as Amicus Curiae

March, 1972

APPENDIX A

COMMUNICATIONS ACT OF 1934,
47 U.S.C. Section 151ff

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

(b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . .

§ 153. Definitions:

For the purposes of this chapter, unless the context otherwise requires —

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services

(among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(t) "State commission" means the commission, board or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

§ 221. (b) Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

§ 301. License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . .

(d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State. . . p.

APPENDIX B

FCC CABLECAST REGULATIONS, 47 C.F.R.

Subpart G—Cablecasting

§ 76.201 Origination cablecasting in conjunction with carriage of broadcast signals.

(a) No cable television system having 3500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by origination cablecasting and has available facilities for local production and presentation of programs other than automated services. Such origination cablecasting shall be limited to one or more designated channels which may be used for no other purpose.

(b) No cable television system located outside of all major television markets shall enter into any contract arrangement, or lease for use of its cablecasting facilities which prevents or inhibits the use of such facilities for a substantial portion of time (including the time period 6-11 p.m.) for local programming designed to inform the public on controversial issues of public importance.

(c) No cable television system shall carry the signal of any television broadcast station if the system engages in origination cablecasting, either voluntarily or pursuant to paragraph (a) of this section, unless such cablecasting is conducted in accordance with the provisions of §§ 76.205, 76.209, 76.213, 76.215, 76.217, 76.221, and 76.225.

§ 76.205 Origination cablecasts by candidates for public office.

(a) *General requirements.* If a cable television system shall permit any legally qualified candidate for public

office, to use its origination channel(s) and facilities therefor, it shall afford equal opportunities to all other such candidates for that office: *Provided, however,* That such system shall have no power of censorship over the material cablecast by any such candidate; and *Provided, further,* That an appearance by a legally qualified candidate on any:

- (1) Bona fide newscast,
- (2) Bona fide news interview,
- (3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) On-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of the facilities of the system within the meaning of this paragraph.

NOTE: The fairness doctrine is applicable to these exempt categories. See § 76.209.

(b) *Rates and practices.* (1) The rates, if any, charged all such candidates for the same office shall be uniform, shall not be rebated by any means direct or indirect, and shall not exceed the charges made for comparable origination use of such facilities for other purposes.

(2) In making facilities available to candidates for public office no cable television system shall make any discrimination between candidates in charges, practices, regulations, facilities, or services for or in connection with the service rendered, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any

cable television system make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office.

(c) *Records, inspections.*

Every cable television system shall keep and permit public inspection of a complete record of all requests for origination cablecasting time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the system of such requests, the charges made, if any, and the length and time of cablecast, if the request is granted. Such records shall be retained for a period of two years.

(d) *Time of request.*

A request for equal opportunities for use of the origination channel(s) must be submitted to the cable television system within one (1) week of the day on which the first prior use, giving rise to the right of equal opportunities, occurred: *Provided, however,* That where a person was not a candidate at the time of such first prior use, he shall submit his request within one (1) week of the first subsequent use after he has become a legally qualified candidate for the office in question.

(e) *Burden of proof.*

A candidate requesting such equal opportunities of the cable television system, or complaining of noncompliance to the Commission, shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office.

§ 76.209 Fairness doctrine; personal attacks;
political editorials.

(a) A cable television system engaging in origination cablecasting shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

NOTE: See public notice, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 F. R. 10415.

(b) When, during such origination cablecasting, an attack is made upon the honesty, character, integrity, or like personal qualities of an identified person or group, the cable television system shall, within a reasonable time and in no event later than one (1) week after the attack, transmit to the person or group attacked: (1) notification of the date, time, and identification of the cablecast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the system's facilities.

(c) The provisions of paragraph (b) of this section shall not be applicable: (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (b) of this section shall be applicable to editorials of the cable television system).

(d) Where a cable television system, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the system shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office, or (ii) the candidate opposed in the editorial, (a) notification of the date, time, and channel of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the system's facilities: *Provided, however,* That where such editorials are cablecast within 72 hours prior to the day of the election, the system shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

§ 76.213 Lotteries.

(a) No cable television system when engaged in origination cablecasting shall transmit or permit to be transmitted on the origination cablecasting channel or channels any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes.

(b) The determination whether a particular program comes within the provisions of paragraph (a) of this section depends on the facts of each case. However, the Commission will in any event consider that a program comes within the provisions of paragraph (a) of this section if in connection with such program a prize consisting of money or thing of value is awarded to any person whose selection is dependent in whole or in part upon lot or

chance if as a condition of winning or competing for such prize, such winner or winners are required to furnish any money or thing of value or are required to have in their possession any product sold, manufactured, furnished or distributed by a sponsor of a program cablecast on the system in question.

§ 76.215 Obscenity.

No cable television system when engaged in origination cablecasting shall transmit or permit to be transmitted on the origination cablecasting channel or channels material that is obscene or indecent.

§ 76.217 Advertising.

A cable television system engaged in origination cablecast programming may present advertising material at the beginning and conclusion of each such program and at natural intermissions or breaks within a cablecast: *Provided, however*, That the system itself does not interrupt the presentation of program material in order to interperse advertising; and *Provided, further*, That advertising material is not presented on or in connection with origination cablecasting in any other manner.

NOTE: The term "natural intermissions or breaks within a cablecast" means any natural intermission in the program material which is beyond the control of the cable television operator, such as time-out in a sporting event, an intermission in a concert or dramatic performance, a recess in a city council meeting, an intermission in a long motion picture which was present at the time of theatre exhibition, etc.

§ 76.221 Sponsorship identification.

(a) When a cable television system engaged in origination cablecasting presents any matter for which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, such system, the system shall make an announcement that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied: *Provided, however,* That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, such cablecasting unless it is so furnished as consideration for an identification in a cablecast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the cablecast.

(b) Each system engaged in origination cablecasting shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program matter for origination cablecasting, information to enable it to make the announcement required by this section.

(c) In the case of any political program or any program involving the discussion of public controversial issues for which any films, records, transcriptions, talent, script, or other material or services of any kind are furnished, either directly or indirectly, to a cable television system as an inducement to the origination cablecasting of such program, an announcement to this effect shall be made at the beginning and conclusion of such program: *Provided, how-*

A11

ever, That only one such announcement need be made in the case of any such program of five (5) minutes' duration or less, either at the beginning or conclusion of the program.

(d) The announcements required by this section are waived with respect to feature motion picture films produced initially and primarily for theatre exhibition.

APPENDIX C

OFFICE OF TELECOMMUNICATIONS POLICY
EXECUTIVE OFFICE OF THE PRESIDENT

Washington, D. C. 20504

Director

November 15, 1971

Honorable John O. Pastore
United States Senate
Washington, D. C. 20515

Dear Senator Pastore:

You have asked me to provide you with the Administration's views on the FCC's cable television proposals, as well as Administration recommendations resulting from the work of the special Cabinet Committee on broadband cable. Since the Committee will not address specifically the FCC's proposed conditions of distant-signal carriage, and since it will in any event not complete its work for several more weeks, I am replying separately to your first request.

The Administration's views on the FCC proposals can be summarized as follows:

- (1) It is highly desirable that the "freeze" on cable development in the major markets be eliminated, and that the new medium be permitted to proceed with its growth as soon as possible in an atmosphere conducive to stability and cooperation among the various interests involved in providing program services to the public.
- (2) Those matters pertaining to cable retransmission of broadcast television signals which the FCC has addressed (i.e., permissible distant sig-

nals, definition of local signals and "anti-leapfrogging") involve the type of substantive determination which, within broad limits, is best resolved by an administrative agency. Those proposals should be supplemented, however, with provisions applicable to radio signals and with restrictions upon importation of copyrighted programming.

- (3) The balance of the proposals, including the division of federal-state authority over broadband cable services, are predicated on unclear authority and address issues of major national concern which will ultimately determine the form and structure of the new industry. Implementation of these proposals should not be allowed to preclude thorough Congressional review of the fundamental policy questions which the Cabinet Committee is considering.

The Supreme Court has affirmed the FCC's authority to impose those regulatory requirements on cable television that are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." The FCC's proposals dealing with carriage of television broadcast signals clearly fall within this authority. Accordingly, there is no question of the FCC's power to resolve such issues as the definition of "local" signals, the appropriate number of distant signals to be carried by cable systems, and restrictions on the points of origin of distant signals (i.e., "anti-leapfrogging").

We have no substantive comments on these aspects of the proposed rules. These provisions are intended to pro-

vide cable with an opportunity for immediate growth, while protecting the economic viability of our "over-the-air" television broadcast system. They involve judgmental determinations of the type which, within broad limits, Congress must of necessity leave to the discretion of its regulatory agencies. What is essential, as far as the broadcast-carriage proposals are concerned, is that there be prompt adoption of a regulatory approach which will receive general acceptance, thereby enabling the sound growth of the industry to proceed.

There are, however, several problems which these broadcast-related proposals leave unresolved: first, there is the problem of the importation of distant radio signals, and second, the problem of exclusivity protection for copyrighted television programming.

Leaders of the affected industries have recently reached an agreement regarding provisions that deal with these concerns and also involve minor modifications of some broadcast-related items already included in the Commission's proposals. If reflected in the Commission's final rules, this agreement would fully meet our concerns regarding radio and copyright. Absent this accord on the final rules, there is serious risk that an end to the freeze will be delayed by challenges in the courts and Congressional hearings on these matters. We believe the public interest would not be served by such developments.

Turning now to those aspects of the proposals which go beyond the conditions of cable retransmission of over-the-air signals, relating to broadband cable as a communications medium in its own right: These aspects of the proposed rules (together with existing rules and further contemplated rulemakings) involve such matters as Federal preemption of state and local control, the extent of

FCC supervision of programming, limitations on numbers of channels, flexibility with respect to new services, and prescribed channel usage. These and other matters of like importance will shape the economic structure, and indeed the character, of the new medium. They are the subject of the Cabinet Committee's work and will ultimately require careful Congressional consideration. The Commission itself has noted that the recent *Midwest Video* case casts doubt upon the legality of this type of regulation, and it has requested Congressional clarification. Similarly, we believe the 1934 Communications Act provides inadequate guidance for the regulation of broadband cable communications. Therefore, while we favor immediate implementation of the proposed rules in order to permit the growth of cable television, our recommendation is based upon the hope and expectation that Congress will address these fundamental aspects of broadband cable policy at an appropriate time, before the economics of the industry and the character of the medium have become irreversibly set in the mold contemplated by the Commission.

As you have stated, cable television involves many fundamental and complex policy matters of national importance. Until they can be resolved by due Congressional deliberation, we believe the public interest will best be served by ending the cable "freeze" through adoption of the FCC proposals. This course of action will enable the Congress to give its full attention at a later time to the major issues involved in the future of broadband communications services without further delaying the expansion of cable television service for the American people.

Sincerely,

/s/ Clay T. Whitehead

Clay T. Whitehead

APPENDIX D

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission,
on its own motion,
Investigation of Cable Television
and other forms of Broadband
Cable Communications in the
State of Illinois

Docket 56191

INTERIM OPINION AND ORDER

* * * * *

Summary and Order

The Commission adopts the following findings of fact and conclusions of law:

1. Cable television is a system of delivery of television signals over a grid of coaxial cables possessing a broad frequency bandwidth, which system can also deliver a variety of other video, audio, and data-grade signals. The system as a whole is properly termed "broadband cable communications."

2. While only a small proportion of Illinois residents have as yet been offered cable television service, franchise proceedings to inaugurate such service are now underway in Illinois communities containing a majority of the State's residents.

3. The business of providing cable television and other forms of broadband cable communications is an engagement "for public use" in "the transmission of telegraph or telephone messages within this State", within the mean-

ing of Section 10-3(b) of the Public Utilities Act, Ill. Rev. Stats., Ch. 111½, Sec. 1 et seq.

(a) As a matter of practical construction, "telephone" service within the meaning of the statute has come to mean a total telecommunications service embracing narrowband and broadband transmission of a wide variety of video, audio, and data-grade messages including television signals.

(b) There is at present a significant service overlap between the offerings of cable television and telephone companies, restrained from full competitive realization by a federal antitrust consent decree entered into by the Bell system and by a cease-and-desist regulation of the Federal Communications Commission affecting independent telephone companies. Neither of these legal restraints is immutable, and present federal policy favors the development of regulated competition for the total telecommunications service each industry is or can become technically equipped to provide.

(c) The huge financial needs of the cable television industry, if it is to meet the objective of wiring the cities and towns of America over the coming decade, will require the adoption of financing techniques similar to those employed by the conventional telephone industry; namely, the floating of high-rated, long-term utility securities.

(d) The methods of operation of the two industries are closely comparable. Both offer a mix of analogue and digital communications. Both have evolved and are evolving from reliance on one dominant medium of transmission to employment of a combination of coaxial cable, wire, and microwave. And the trend in both industries has been and is from the initial offering of party-line service to the development of switched services.

4. The Commission therefore has, and hereby asserts, jurisdiction to regulate cable television and other forms of broadband cable communications as a statutory public utility.

5. The elaboration of rules and regulations governing the exercise of that jurisdiction will require careful consideration, after further hearings to be held on a Notice of Inquiry and of Proposed Rule Making now being formulated by the Commission.

6. Three important issues are being expressly left open for further evidence and comments in those hearings. They are:

- (a) The extent to which, and the procedures whereby, presently operating systems should be "grandfathered" by having their operating authority confirmed, or excluded from regulation because of their limited size or operation (e.g., apartment-house "master antenna" systems).
- (b) The nature and timing of regulations, appropriate to the present stage of development of broadband cable communications in the State of Illinois, addressed to the determination of "just" and "reasonable" rates.
- (c) The possibility of developing cooperative certification procedures with Illinois municipalities, so as to give them a suitable voice in planning for and meeting the communications needs of their local residents.

7. Pending the elaboration of such rules and regulations, the Commission proposes as nearly as possible to maintain the *status quo*. This means that no construction of authorized but unbuilt cable systems may be undertaken,

nor may any other activity be carried out that would, under the Public Utilities Act, require Commission authorization—unless in a particular case the Commission waives the application of one or more provisions of the Act on the basis of a showing of severe and demonstrable hardship.

8. State regulation by the Commission is not only authorized but necessary to counter the challenge of possible federal regulatory pre-emption. The undeniable local interest in the nature and quality of broadband communications services can be better served by a combination of Federal and State regulation than by exclusively Federal control.

9. Federal and municipal regulatory authorities together lack the control capacity to prevent the under-financing and under-engineering of cable television systems, particularly in the larger markets where greater technical sophistication and capital expenditures will be required. This Commission and its staff are accustomed to meeting such problems with other regulated utilities, and to assuring the preservation and upgrading of service quality by already installed systems. A cable television system, being a *de facto* monopoly, lacks the incentive if not effectively regulated to assure the maintenance of top-quality service.

10. The overriding public interest in the service potential of broadband cable communications takes three distinctive forms:

- (a) "channel choice", or the diversification of entertainment and information services available at the option of television viewers and subject to their selection, in their homes and places of business;

- (b) the availability to would-be subscribers of cable television service without undue delay or discrimination, and without excessive signal degradations or outages; and
- (c) the availability to would-be programmers and advertisers—including sources of information, news, opinions, education, entertainment, and home and business services—now excluded as a practical matter from the mass television broadcasting medium, of nondiscriminatory and legally guaranteed access to leased cable channels for the purpose of transmitting their messages.

The Commission will include detailed rules for the realization of those objectives in its Notice of Proposed Rule Making.

IT IS THEREFORE ORDERED that:

(1) The Commission hereby assumes jurisdiction under Sec. 10-3(b) of the Public Utilities Act, Ill. Rev. Stats., Ch. 111½, Sec. 10-3(h), over "broadband cable communications systems", defined to mean and include any system of coaxial cables or other electrical conductors and equipment used or capable of being used for the delivery of television or radio signals, or voice or data, by analogue or digital transmission, to subscribers in the State of Illinois for a service fee, whether such messages were obtained off-the-air or locally originated or both; together with appurtenant towers and antennas, origination and control centers, switching and computer facilities, and all lines, fixtures, equipment, attachments, and appurtenances thereto used or useful in the construction, maintenance, and operation of such a system.

(2) The hearings in this proceeding are hereby continued indefinitely, pending the elaboration of specific

rules and regulations for the broadband cable communications industry.

(3) The Commission will issue as soon as they can conveniently be prepared: (a) a summary of the record to date, and (b) a Notice of Inquiry and of Proposed Rule Making. When these documents have been issued, the hearings will resume on the issues identified in the latter Notice.

(4) Pending the completion of these proceedings, and the adoption of specific rules and regulations for the broadband cable communications industry, no new construction within the meaning of Sec. 55 of the Public Utilities Act may be undertaken by such industry in Illinois, unless and except to the extent that the Commission grants a waiver of this restriction in particular cases on good cause shown. Previously planned activities other than such new construction may however be carried out during this period without Commission authorization by broadcast and cable communications systems that have, as of the date of this order, already engaged in substantial construction of their systems. No other system may take any action during this period that would under the provisions of the Public Utilities Act require Commission approval, unless and except to the extent that the Commission grants a waiver of this restriction with respect to one or more of such provisions in particular cases on good cause shown.

By order of the Commission this 9th day of September, 1971.

/s/ DAVID H. ARMSTRONG
Chairman

[SEAL]
WSC/lw

APPENDIX E

ILLINOIS COMMERCE COMMISSION,
 NOTICE OF PROPOSED RULE MAKING
 IN DOCKET 56191
 — BROADBAND CABLE COMMUNICATIONS —
 ADOPTED JANUARY 5, 1972

• • • • •

4. Initial service capacity and expansions thereto.

(a) *Channel number and use.* The broadcast signals that can be carried by cable systems are regulated exclusively by the FCC. This Commission will require only that Illinois cable systems carry the maximum number of permissible broadcast signals. In addition, when there are specific criteria to be met (e.g., the determination of "significant viewing" of nearby out-of-market signals as defined by the FCC), the burden of exercising best efforts to meet these criteria should be placed on the system operator.

As for *nonbroadcast* services, the regulatory proposals of the FCC stand on far less certain footing. The State of Illinois has joined in litigation (*United States v. Midwest Video Corporation*, U.S. Supreme Court, No. 71-506) aimed at resolving the authority of the FCC in this area, which the federal Office of Telecommunications Policy has characterized as "unclear" and requiring Congressional review. For present purposes, this Commission will accept the FCC proposals as helpful guidelines to minimum service requirements. There are several nonbroadcast services to be considered.

First, either separately or in conjunction with local program origination, one channel should offer passive display services on a continuing 24-hour basis: time and

weather and the day's program log on all channels, both broadcast and nonbroadcast, at a minimum. These passive displays may also carry advertising on the top or bottom half of the screen. Second, the cable operator *may* offer its own local programming, over the same or one different channel, but only on a non-profit basis; that is, the sum total of any advertising revenues it earns in connection with such programming must recover no more than its direct costs. The Commission's concern here is to avoid giving the cable operator a proprietary interest in its own programming that could conflict with the public interest in promoting widely diverse programming opportunities on the other cable channels. It should be noted that the FCC's local origination requirement has been suspended pending the outcome of the *Midwest Video* litigation previously referred to; and in any case its definition of "cablecasting", namely programming "originated by the CATV operator or by another entity", can be satisfied by ensuring adequate local access to free or leased channels as described below. This Commission does not believe that either the "equal time" or "fairness" provisions of FCC regulations are properly applicable to cablecast programming, so long as ample channel capacity is provided over public-access and leased channels to accommodate all points of view.

The FCC is proposing that each cable system set aside one dedicated channel each for public-access, educational, and governmental use. These channels would be offered without time charges, but the operator could recover production costs (aside from those for live studio presentations not exceeding five minutes in length). The public-access channel would be non-commercial and available at all times on a non-discriminatory basis. Dedication of addi-

tional channels for these purposes would be precluded unless the FCC consents.

There are problems with this proposal. One channel each for the described purposes may be quite inadequate to the needs of many communities, yet requiring still further "free time" from cable operators may saddle them with unmanagable financial burdens. This Commission therefore proposes to adopt the FCC proposals provisionally, and to deal with additional access needs through its own regulation of leased channel operations.

On this subject the FCC proposals seem inadequate. They include no requirement regarding channel allocation beyond the stipulation that at least one leased channel give priority to part-time users. While there is always an element of hazard in borrowing concepts uncritically from other fields, this Commission believes that a minimum of one leased channel on each system should be operated on "common carrier" principles. This means that rates would be uniform and not so high as to discourage any member of the public from applying to use them; that this channel would have adequate studio and production equipment; and that the cable system would adopt rules and practices designed to prevent preemption of excessive time by any user or class of users during specified time periods. The Commission will require that the operator's proposed rules and rates for these services be submitted for its approval.

The remainder of the available channels may be dedicated or contracted for any of the following purposes, with the allocation to be made by the operator on the basis of the survey of community needs: (1) additional educational and municipal channels, at rates that will at least recover the operator's costs; (2) special business and professional services, such as stock quotations or medical seminars, sent

to limited classes of subscribers; (3) home service such as shopping by wire, as well as news and entertainment programming acquired commercially by the operator; (4) pay cable offerings of major sports and entertainment events, to the extent permitted by the FCC (*note that local franchise prohibitions of pay cable are precluded*); and (5) other services as they are developed. The operator's service proposals for these channels may be made the basis for municipal selection of a franchisee, subject to later application by an operator to this Commission for changes in the light of operating experience.

Just as with a telephone company, a cable system shall exercise no content control over any programming (other than its own, if any), and any liability for injurious programming shall attach to its originator rather than to the cable system. The cable operator's rules shall require that this be made plain to all users, and any user that is judicially found liable for obscenity or libel or incitement to riot or sedition as a result of its programming may be barred by the Commission from further use of all cable systems in the State for up to three years. Beyond that, a large preference in franchise (or certification) proceedings should be awarded to any cable operator who proposes to provide subscribers with a scrambling device and locked switch to give parents control over the viewability of nonbroadcast channels.

Overall channel capacity will be the critical determinant of the number and variety of specialized nonbroadcast services made available to communities. The FCC has proposed a minimum of 20 channels in the top 100 markets, while leaving room for upward deviations, but has said nothing about the number or configuration of broadband cables required to carry this number of signals with-

out loss of quality. The FCC has also proposed that the nonbroadcast band width in all markets be at least as broad as the frequency spectrum utilized for carriage of broadcast signals. This Commission accepts those minima but believes they require expansion and elaboration.

A very helpful guide in these matters is to be found in Appendix A to the recent comprehensive Report of the Sloan Commission on Cable Communications,* whose findings are consistent with the evidence presented to this Commission. Of the various presently available system configurations for delivering multiple channels, the one that offers the most flexibility at reasonable cost with built-in expansion capacity and maximum freedom from internally generated interference and distortion problems appears to be the multiple cable. At the outset, a dual cable using VHF-only standard broadcast channels can assure quality signals over a nominal capacity of 24 channels, albeit an actual capacity of only 16-20 channels (or as few as 10 in major television markets such as Chicago) because of interference from strong local broadcast signals. In smaller communities, below 50,000 in population, this should ordinarily be enough to accommodate all initial demand for off-the-air signals, local origination, leased and dedicated channels, and other uses such as FM radio. Experience indicates that it takes time and effort to stimulate use of public-access and common-carrier channels; other leased, pay-cable, and specialized programming also will take time to develop; and it will be some time before regional or national cable networking makes significant demands upon spare channel capacity.

* John E. Ward, "Present and Probable CATV/Broadband-Communication Technology", Sloan Report, p. 179 (McGraw-Hill, 1971).

As these demand factors develop and electronic technology is improved to keep pace, a dual-cable system can readily incorporate improved converters and return-path amplifiers (which need be fitted on only one of the cables), so as to offer as many as 50 (ultimately, perhaps 70) broadcast-band-width channels with two-way capability at no observable loss of quality. The anticipated costs of such a dual cable/converter system with upstream channel capacity are fairly comparable to those for a single cable multiplexed system, and the quality and flexibility of the former appear considerably superior. It should be noted that the principal cost component in building a system is not the purchase cost of the cable itself but the construction cost of stringing the cable through ducts or on poles. Initial installation of more than one cable should thus offer long-term savings.

The Commission therefore proposes to require that systems in communities below 50,000 in population provide a minimum of two trunk, feeder, and tap-off cables either in parallel or encased in a multi-tube housing. For systems in larger communities, a minimum requirement of three cables—with 24 or more assured channels at the outset, expandable to 75 or more over time—seems necessary and advisable.

The population standard would be applied to communities rather than franchise areas, even though the Commission recognizes that larger communities are likely to franchise two or more cable systems each serving only a portion of the population. There are physical constraints on the size of a single cable system, such that—according to expert engineering testimony presented to the Commission—it may prove necessary in a city the size of Chicago to franchise perhaps four to six separate systems. But

some at least of the messages carried on such systems are likely to be of immediate interest to residents of other franchised areas within the larger community; and there should be adequate channel capacity on each system to interconnect for this purpose with the others. Indeed when the community as a whole exceeds a certain size there may be reason for the Commission to specify an even higher minimum capacity. Tentatively, and with the invitation of comments, the Commission proposes to classify a "community" for population purposes in accordance with the Census Bureau's definition of a Standard Metropolitan Statistical Area; and to specify a minimum of four cables in SMSA's with a population in excess of 250,000.

(b) *Other capacity.* Two-way capacity will be necessary to realize cable's service potential in a number of areas, and amplifiers with return-path capability have been made commercially available. The major variables relate to signal grade, switched service, and subscriber terminal equipment.

The available return bandwidth can be used for either "data grade" or "video grade" signals. The "video grade" capability can be used to link fixed or mobile studios to the head-end for distribution on the system of local programming. This requires no subscriber terminal equipment, and indeed the costs and limited foreseeable uses of home video origination are such as to rule out the present requirement of any such equipment. So also, while it is conceptually possible to develop point-to-point switched video services, so that any subscriber could talk to and see any other subscriber, the costs for such an operation appear at present to be wholly out of reach.

This then leaves video-grade two-way usage a matter for the system operator to incorporate in his studio and

mobile origination design. The subscriber will be interested in data-grade equipment, which may be either for "simple monitoring" or "more general narrow-band communication and control capabilities" (the quoted phrases are taken from, and more extensively described in, the Sloan Commission Report at p. 182). The Commission proposes to require that one of these two types of services be offered by cable systems, and that the choice be made by municipal officials as part of the competitive franchising process. Local officials may also decide to require that cable systems provide a separate cable (in addition to those employed for signal delivery) for return signals. Some of the more modern systems, such as at Reston, Virginia, have done this.

It will in any event be necessary for cable systems to provide a switch and visible or audible signal on or in close proximity to a subscriber's television receiver, so that he may know at all times whether a return signal is being transmitted and may positively control feed-back originating from his home.

Studio facilities and equipment for live and taped cablecast production must also be provided for the dedicated governmental, educational, and public-access channels, as well as for the leased common-carrier and specialized channels, and technical assistance must be made available to users of these channels. The equipment should be capable of play-back of all standard sizes and types of film, video tape, and sound recordings and audio tape. The number and location of fully-equipped studios is difficult to specify in the abstract, and the Commission would welcome evidence and comments on this point. As a starting point, it seems necessary to provide separate studios for each of the dedicated channels, and one for all other cable-

casting purposes (bearing in mind that many transmissions will be taped and that usage may develop slowly at first)—for a minimum of four, to which local franchising officials could add. The possibilities of combining equipment and/or studios are not clear, however. The Commission believes that studio and equipment requirements should not exceed those for which there is an immediate use, since it is fairly easy to add capacity of this sort as demand requires, and because cable operators should be assured of the opportunity to earn a return on the studios and equipment they provide.

One other possibility which is being pursued in some communities bears mention at this point. That is for the cable operator to satisfy in full his responsibilities for educational and governmental uses of the system by making one separate cable available free of charge solely for such uses, with channel allocation on that cable decided by a committee of municipal and school-system officials. Under such an arrangement, the cable operator would be relieved of the cost of providing studios and equipment and technical assistance for governmental and educational programming. The Commission proposes to give sympathetic consideration to such arrangements, and would welcome comments on whether they should be established in the form of a general requirement.

(c) *Expansion capacity.* The Commission's proposed rules with regard to expandable channel and two-way capacity have already been described above. The Commission will also require that system designs be sufficiently flexible to incorporate more sophisticated developments when and if commercially proven. These prominently include, based on present knowledge: computer switching and program-access centers; the neighborhood exchanges and twisted-wire leads associated with dial-access systems;

and origination points for cable conferencing as now offered by the British Postal Office. System designs should indicate where and how such developments could be added to the system after its construction.

(d) *Timing of future expansions.* In order to determine when new services or equipment should be added to systems, it is necessary to keep abreast both of technological developments and of market demand. The FCC's so-called "N plus 1" proposal would deal only with additions to the number of channels and not with inauguration of new services or installation of more sophisticated equipment. This Commission proposes to deal with those questions by requiring a triennial survey of business and community needs, to be conducted by each cable system. The survey form, which the Commission proposes to develop and refine periodically with the aid of an industry advisory group including consumer representatives, would be designed to determine: (1) the commercial availability of new equipment and programming services; (2) the demand for such innovations by both present and potential subscribers; and (3) the extent of the subscribers' willingness to pay for the costs and appropriate profits associated with such innovations. The record of the cable operator in responding to these surveys, as compared with the performance of similarly situated operators in Illinois and other states, would be a matter for consideration by the Commission on applications for rate increases and at the 10-year certificate renegotiation.

(e) *Present systems.* Illinois cable systems that are "grandfathered" by the Commission would have to bring themselves into substantial compliance with the foregoing requirements when they are (1) transferred to other ownership, (2) extensively rebuilt or (3) up for 10-year certificate renegotiation before the Commission.

APPENDIX F

92d CONGRESS

1ST SESSION

S. 792

IN THE SENATE OF THE UNITED STATES

FEBRUARY 17, 1971

Mr. PASTORE (by request) introduced the following bill;
which was read twice and referred to the
Committee on Commerce

A BILL

To amend the Communications Act of 1934 to provide for the regulation of community antenna television systems.

1 *Be it enacted by the Senate and House of Repre-*
2 *sentatives of the United States of America in Congress*
3 *assembled, That (a) section 3 of the Communications*
4 *Act of 1934 (47 U.S.C. 153) is amended by adding at*
5 *the end thereof the following new subsection:*

6 *“(gg) ‘Community antenna system’ means any fa-*
7 *cility which, in whole or in part, receives directly or*
8 *indirectly over the air and amplifies or otherwise mod-*
9 *ifies the signals transmitting programs broadcast by*
10 *one or more broadcast stations and distributes such*
11 *signals by wire or cable to subscribing members of the*
12 *public who pay for such service”.*

1 (b) Part I of title III of the Communications Act
2 of 1934 (47 U.S.C. 301 et seq.) is amended by insert-
3 ing therein, immediately after section 330 thereof, the
4 following new section:

5 "REGULATION OF COMMUNITY ANTENNA
6 SYSTEMS

7 "SEC. 331. (a) The Commission shall, as the public
8 interest, convenience, or necessity requires, have au-
9 thority—

10 " (1) to issue authorizations and orders, make
11 rules and regulations, and prescribe such condi-
12 tions or restrictions with respect to the construc-
13 tion, technical characteristics, and operation of
14 community antenna systems, to the extent nec-
15 essary or appropriate to carry out the purposes
16 of this Act, with due regard to the orderly ac-
17 commodation of both the community antenna and
18 broadcasting industries, in order to secure maxi-
19 mum diversity of programming through the main-
20 tenance and expansion of broadcasting and the
21 provision via community antenna systems of mul-
22 tiple reception, origination, and related services;
23 and

24 " (2) to make general rules exempting from
25 regulation, in whole or in part, certain commu-
26 nity antenna systems where it is determined that
27 such regulation is unnecessary because of the
28 size or nature of the systems so exempted.

29 The Commission shall, in determining the application

1 of any rule or regulation concerning the carriage of
2 broadcast stations by community antenna systems, give
3 due regard to the avoidance of substantial disruption
4 of the services to subscribers of community antenna
5 systems which were validly in operation on April 1,
6 1970.

7 “(b) The Commission shall prescribe such rules
8 and regulations and issue such orders as may be nec-
9 essary to require the deletion by community antenna
10 systems of signals carrying any professional football,
11 baseball, basketball, or hockey contest if, after appli-
12 cation by the appropriate league, the Commission finds
13 that the failure to delete such signals would be con-
14 trary to the purposes for which the antitrust laws are
15 made inapplicable to certain agreements under the Act
16 of September 30, 1961 (75 Stat. 732; 15 U.S.C. 1291
17 et seq.).”

APPENDIX G

ARTHUR D. LITTLE, INC./NEWS
Public Relations Department

25 Acorn Park / Cambridge, Mass. 02140 / (617)864-5770
INFORMATION CONTACT:

Patricia K. Finnegan, Ext. 2411

FOR RELEASE: Immediate.

NEW CABLE SERVICES—A STEP NEARER

Cambridge, Massachusetts . . . Arthur D. Little, Inc. (ADL) — the international management consulting firm — announced today that it has been retained by a group of United States and Canadian companies for further study of the economic viability of interactive cable services.

This jointly sponsored project is expected to be a significant step in developing a new technologically oriented business and a new communication medium for the United States and Canada. It will help overcome a major deterrent until now to the development of new cable services anywhere in the world, namely the uncertainty as to what combination of new services would both successfully serve public needs and also be economical. A key objective of the project is to ascertain the profit potential of services in addition to entertainment TV on a far more factual basis than has ever before been attempted.

The experimental project is oriented toward actually testing how consumers, business, and local government will use new cable services. Wherever possible the field test will use existing communication facilities, prototype terminal and control equipment, and existing data-storage equipment. The test site will be located in a geographic

area where cooperative effort exists among local educators, municipal agencies, advertisers and communication systems organizations. The flexibility of the test system will allow a large number of tests to be performed by many organizations.

The plans to be developed constitute Phase II of a three-phase project. Phase I, a market study, was concluded in mid-1971. Called "BCN" (Broadband Communication Networks), the project's first phase was sponsored by 36 U.S. and Canadian firms. Although the findings are confidential to the participating firms, initiation of the Phase II market test planning suggests that profitability for new cable services was found to be a definite possibility. Phase III will be the actual field test.

ADL Project Manager, John P. Thompson, said, "The Phase I market study indicated that people are interested in a significant number of new services and types of public- and private-service programs. Phase II of the project will design a flexible, sophisticated market test system to prove in the field the value of a wide variety of cable services. Firms already involved in the project include: the Bank of America, Bell Canada, Burlington Industries, Encyclopedia Britannica, IBM, Magnavox, Million Market Newspapers, Southam Press, Westinghouse and Zenith. Participation in the project is still open to companies and government agencies who are interested in helping to develop a new communication medium for the United States and Canada and in testing their services over such a network."

Cable systems have the capability of delivering literally dozens of extra TV or video channels to homes and carry return signals of viewer opinion for shopping at home, home education and testing, audience participation

programs and surveys, and even local, state, and federal voting.

Many knowledgeable observers believe that cable television has enormous potential in the administration and operation of cities and states, and in the reduction of the communication gap that exists in many areas. Thus, federal, state, and municipal government agencies have been and are continuing to be invited to participate in the project.

Public institutions are expected to make extensive use of cable systems. Educational job-training programs for the disadvantaged or the shut-in, or at least programs to tell people what help is available, will have the added benefit of obtaining reactions over a return channel. School boards will be able to receive citizen response from home viewers during crucial meetings. Law enforcement agencies will be able to increase their communication and surveillance services for business and citizens, and enhance interpersonal relations with the communities they serve. Government agencies will be able to gain immediate voter response to policies, programs, and new ideas, thereby enabling them to be more responsive to the needs and desires of citizens.

The potential impact of new communication services on business and consumers extends into even more areas. Banks, real estate firms, travel agencies, and insurance companies, for example, may use the system for improved interaction with customers as well as for internal services.

MOTION FILED

MAR 30 1972

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and FEDERAL
COMMUNICATIONS COMMISSION,

Petitioner,

v.—

MIDWEST VIDEO CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**MOTION OF THE AMERICAN CIVIL LIBERTIES
UNION FOR LEAVE TO FILE BRIEF *AMICUS
CURIAE*; AND BRIEF *AMICUS CURIAE***

MELVIN L. WULF
LAWRENCE G. SAGER
SCOTT ROBB
RONALD S. REICH

American Civil Liberties
Union Foundation
156 Fifth Ave.
New York, N. Y. 10010

Attorneys for Amicus

INDEX

	PAGE
Interest of Amicus	3
Question Presented	3

ARGUMENT

The Program Origination Requirement Restricts Rather Than Promotes the Constitutional Interest in Free Expression Upon Which the Federal Communications Commission's Regulatory Authority Is Founded and by Which That Authority Is Limited

4

A. The Regulatory Authority of the F.C.C. Is Founded Upon and Limited by First Amendment Concerns of Free Expression

4

B. The Program Origination Requirement Dis-serves the Commission's Constitutional and Statutory Mandate to Maximize the Opportunity for Free Expression Through the Electronic Media

7

1. The Program Origination Requirement Perpetuates Governmental Regulation of Content in a Medium Where Such Regulation Is Not Justified by the Exigencies of Scarcity

7

2. The Program Origination Requirement Will Encourage the Cable Industry to Restrict the Opportunity for Free Expression

11

CONCLUSION.	14
------------------	----

APPENDIX

Sources on the Technological and Economic Feasibility of Broad Band Communications Systems 15

TABLE OF AUTHORITIES

Cases:

Amalgamated Food Employees Union v. Logan Valley Plaza Inc., 391 U.S. 308, 20 L. ed.2d 603 (1968)	6
American Trucking Associations, Inc. v. F. C. C., 377 F.2d 121, 8 R.R.2d 2026 (D.C. Cir. 1966)	9
Associated Press v. United States, 326 U.S. 1 (1945)	5
Cable Vision, Inc. v. KQTV, Inc., 211 F. Supp. 47 (D.C. Idaho 1962), <i>vac. and remanded on other grounds</i> , 355 F.2d 398, <i>cert. den.</i> 379 U.S. 989	10
Cox v. New Hampshire, 312 U.S. 569, 61 S. Ct. 762 (1941)	6
Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251, 16 R.R. 1005 (1958)	9
General Telephone Co. of California v. F. C. C., 413 F.2d 390 (D.C. Cir. 1969), <i>cert. den.</i> 396 U.S. 888	10
General Telephone Co. of the Southwest v. U. S., — F.2d —, 22 R.R.2d 2179	10
Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929)	5
Grosjean v. American Press, 297 U.S. 233 (1936)	5
Guyot v. Pierce, 372 F.2d 658 (5th Cir. 1967)	6
Marsh v. Alabama, 326 U.S. 501 (1946)	6

National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943)	7
Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930)	13
Philadelphia Television Broadcasting Co. v. F. C. C., 359 F.2d 282 (1966)	9
Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969)	4, 5, 8
United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)	13
United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912)	13
University Committee to End the War in Vietnam v. Gunn, 289 F. Supp. 469 (C.W.D. Tex., 1968), <i>aff.</i> 399 U.S. 383, 90 S. Ct. 2013 (1970)	6

Constitutional Provision:

United States Constitution	
First Amendment	4, 5, 6, 7

Statutes:

Communications Act of 1934	
47 U.S.C. §151	4
47 U.S.C. §§151 et seq.	7
47 U.S.C. §153(b) and (c)	10
47 U.S.C. §§201-202	9
47 U.S.C. §303(g)	4
47 U.S.C. §326	4

Federal Communications Commission

20 F.C.C.2d 201 3, 4

Radio Act of 1927

§4, 44 Stat. §63 5

Public Law 632, 69th Congress 7

*Other Authorities:**Notice of Proposed Rulemaking and Notice of Inquiry,*
15 F.C.C.2d 417 9-10Rothenberg, "Consumer Sovereignty and the Economics of TV Programming," *Studies in Public Communications* (Fall 1962) 12Steiner, "Program Patterns and the Workability of Competition in Radio Broadcasting," *Quarterly Journal of Economics*, LXVI (May 1952) 12"Telestatus Report," *Broadcasting* 63-66 (December 28, 1970) 7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and FEDERAL
COMMUNICATIONS COMMISSION,

Petitioner,

—v.—

MIDWEST VIDEO CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**MOTION OF THE AMERICAN CIVIL LIBERTIES
UNION TO FILE BRIEF *AMICUS CURIAE***

The American Civil Liberties Union respectfully moves for leave to file a brief *amicus curiae* in this case.

Throughout its 50 year history, the American Civil Liberties Union has been deeply committed to the ideal of free and open expression which is embodied in the First Amendment to the Constitution of the United States.

For some time it has been apparent that, while the broadcasting media present great potential for the realization of this ideal, they have developed in ways which fall drastically short of a realization of that potential.

The advent of cable carrier technology presents a renewed opportunity to create a system of mass communications available to all who wish to speak and to all who wish to hear. We are deeply concerned that governmental involvement in this new communications technology promote rather than retard the fruition of such a system. Our brief is addressed to what we regard as the disservice to this end effectuated by the Order of the Federal Communications Commission which is the object of this case.

For these reasons, we respectfully request leave to file the within brief *amicus curiae*.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movants

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and FEDERAL
COMMUNICATIONS COMMISSION,

Petitioner,

—v.—

MIDWEST VIDEO CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE

Interest of Amicus

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

Question Presented

This brief is addressed solely to the issue of whether the program origination requirement promulgated by the Federal Communications Commission in 20 F.C.C.2d 201, is in furtherance of the Commission's statutory and constitutional mandate.

A R G U M E N T

The Program Origination Requirement Restricts Rather Than Promotes the Constitutional Interest in Free Expression Upon Which the Federal Communications Commission's Regulatory Authority Is Founded and by Which That Authority Is Limited.

The Federal Communications Commission Memorandum Opinion and Order adopted October 27, 1969, 20 F.C.C.2d 201, requiring program origination by cable operators having 3,500 or more subscribers, must be judged in light of its tendency to promote or inhibit exercise of the First Amendment freedoms of speech and the press. The F.C.C. can not be permitted to accomplish by indirection, or misapprehension and mistake, what it is forbidden to accomplish directly by the Constitution and by the enabling legislation (Communications Act of 1934, 47 U.S.C. 151, 35 *et seq.*) to which it owes its existence.

A. The Regulatory Authority of the F.C.C. Is Founded Upon and Limited by First Amendment Concerns of Free Expression.

Under Section 326 of the Communications Act of 1934, 47 U.S.C. §326, the Federal Communications Commission is specifically enjoined from adopting or promulgating any "regulation or condition which shall interfere with the right of free speech by means of radio communication." Section 303(g) of the same Act, 47 U.S.C. §303(g), affirmatively directs the Commission to "encourage the larger and more effective use of radio in the public interest." And as this Court stated in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969):

It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail rather than to countenance monopolization of that market whether it be by the government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or the F.C.C. 395 U.S. at 390.

Shortly after its creation with the mandate act in response to the public "convenience, interest or necessity" (Radio Act of 1927, §4, 44 Stat. §63), the Commission itself declared that the "public interest requires ample play for the free and fair competition of opposing views." *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929).

In our era, the development and regulation of the electronic media have an extraordinarily important impact upon the realization or frustration of the concerns addressed by the First Amendment guarantees of freedom of speech and the press. Those guarantees rest "on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). They go "... to the heart of the natural right of members of an organized society, united for their common good to impart and acquire information about their common interests." *Grosjean v. American Press*, 297 U.S. 233, 243 (1936). Free access to the media of Communications is essential if these concerns are to be realized.

In colonial and post-revolutionary days, until the advent of telephonic communication late in the Nineteenth Century, access to the media of communications implied the freedom to speak to one's neighbors in the local town hall, or in the village square. These and other areas were preserved as arenas for controversy, and access was guaranteed to all "... for the communication of thought and discussion of public questions immemorially associated with resort to public places." *Cox v. New Hampshire*, 312 U.S. 569, 61 S. Ct. 762, 765 (1941); see also, *Guyot v. Pierce*, 372 F.2d 658, 661 (5th Cir. 1967), and *University Committee to End the War in Vietnam v. Gunn*, 289 F. Supp. 469, 477 (C.W.D. Tex., 1968), *aff.* 399 U.S. 383, 90 S. Ct. 2013 (1970). Streets, sidewalks and other similar places "are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Amalgamated Food Employees Union v. Logan Valley Plaza Inc.*, 391 U.S. 308, 20 L. ed.2d 603, at 610 (1968); see also, *Marsh v. Alabama*, 326 U.S. 501 (1946).

In the Twentieth Century it is apparent that older modes of communication—public speech, newspapers, mail—are increasingly inadequate fully to serve the needs of the American people. Unamplified public speech can reach a few hundred people, but not the millions who inhabit our cities and rural areas. Newspapers and magazines which from the middle of the Nineteenth Century until the last few decades constituted our major media of mass communications face ever-increasing difficulty in maintaining their audiences which have in significant numbers turned

to radio and television as substitutes. The town halls and squares of Post-revolutionary America have been largely replaced, functionally, by small screens ensconced in the living rooms of most American homes.¹ Television today is the central public forum of our people and nation. That forum—at least to the extent of governmental involvement in its evolution—must be structured to facilitate the aims of the First Amendment, both as a matter of individual right and of national necessity.

B. *The Program Origination Requirement Disserves the Commission's Constitutional and Statutory Mandate to Maximize the Opportunity for Free Expression Through the Electronic Media.*

1. *The Program Origination Requirement Perpetuates Governmental Regulation of Content in a Medium Where Such Regulation Is Not Justified by the Exigencies of Scarcity.*

The history of the regulation of radio and television broadcasting in the United States reflects a concerted effort to achieve the widest and fairest possible use of the limited resource known as the electromagnetic spectrum. The Radio Act of 1927 (Public Law 632, 69th Congress) and Communications Act of 1934 (47 U.S.C. §§151 *et seq.*) clearly reflect this primary congressional concern. Judicial consideration of the broadcast media has likewise reflected this awareness: "[Broadcast] facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 214 (1943).

¹ In excess of 95% of American homes have access to television. See, "Telestatus Report," *Broadcasting* 63-66 (December 28, 1970).

The result of the highly restrictive capacity of the electromagnetic spectrum upon which the broadcast media rely has been an acute tension between the end of minimizing governmental interference with the scope and content of broadcast media programming and the end of insuring some freedom of public access to the necessarily limited resources of those media. Thus, while the F.C.C. has generally exercised its regulatory powers with restraint, it has engaged in the regulation of program content in order to insure that those who have been granted monopoly control over various segments of the public airways do not completely restrict the access of various persons, groups or ideas to those airways. The Fairness Doctrine, of course, is a prominent example of such a resolution between competing aspects of the social interest in free expression. See *Red Lion Broadcasting Co. v. F.C.C.*, *supra*.

Cable technology, unlike radio and television broadcasting, does not carry with it this inherent tension between governmental regulation of program content and private restriction of program content. While the number of separate radio or television transmissions which can be distributed and received in any given area through the medium of the electromagnetic spectrum is drastically limited by the phenomenon of "interference," there is no limit to the number of discreet signals which can be distributed and received by cable. Thus, in a city like New York—where there are presently only seven television broadcast channels utilizing the Very High Frequency spectrum and a relatively small number of channels utilizing the Ultra High Frequency spectrum (which has a shorter range and technically inferior signal)—it is technically and economically possible to sustain a virtually un-

limited variety of program and information services utilizing the low-cost and infinitely expandable capacity of cable transmission.² If the transmission capacity of cable is realized to a substantial degree, and if access to that capacity is not artificially restricted, free expression will flourish..

The place of governmental regulation of a medium like cable is that of insuring capacity appropriate to social needs and access to that capacity at reasonable rates by all interested communicators. In other words, cable systems could and should be regulated as common carriers.³

² "Broadband cable" is composed of numerous channels or communications paths of varying frequencies capable of transmitting electrical communications. Because of the wide range of frequencies available for data transmission, a single cable can carry a variety of signals for different uses. Among the present uses of broadband cable are CATV transmissions, reproduction of documents and photographs, telegraph, telephoto, remote metering and the like. See *American Trucking Associations, Inc. v. F. C. C.*, 377 F.2d 121, 8 R.R.2d 2026 (D.C. Cir. 1966). In Akron, Ohio, a cable system with an 82 channel capacity is now in operation. In the appendix to this brief, your *amicus* has collected authorities which detail the economic and technical feasibility of fully articulated cable systems.

³ The early, judicially supported view of the Commission was that "Community Antenna Television" Systems (CATV) were not common carriers within the meaning of Title II of the Communications Act, 47 U.S.C. §§201-222. See, e.g., *Philadelphia Television Broadcasting Co. v. F. C. C.*, 359 F.2d 282. (1966). But this view was predicated upon cable technology in its infancy, and involved an assessment of "systems generally . . . designed to receive a broadcast television signal at a favorable point of reception . . . where the system's receiving antenna is situated." *Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251, 16 R.R. 1005 (1958). But the Commission itself has acknowledged that cable technology has undergone a radical change and requires drastic adjustment of regulatory perspective. "It now appears" the Commission has noted, that "cable technology may be on the verge of expanding system capacity to 20 or more channels, and that a variety of new services to the public are envisioned." *Notice of Proposed Rule-*

But there is no need and no justification for governmental regulation of content in such a medium. Far from promoting free expression, the program origination requirement will inspire its restriction by the cable industry as will be explained below.

The origination requirement sets a precedent for governmental regulation of content in a medium which does not possess the characteristics which justify such regulation of the broadcast media. Moreover—if your *Amicus* is correct in its well-supported belief that the origination requirement will promote the private contraction of the cable medium—the requirement will indirectly spawn much more substantial governmental involvement in the content of cable systems. For, if the cable industry is encouraged to develop along the restricted lines of the broadcast industry, the same considerations which have prompted detailed

making and Notice of Inquiry, 15 F.C.C.2d 417, 418. See note 2, *supra*.

Present cable technology fully justifies Commission authority to regulate cable operators as common carriers under Title II. "Common carrier" is defined for purposes of that title as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." 47 U.S.C. §153(b). Persons engaged in "radio broadcasting" are excepted from the status of "common carrier," but cable carriage is clearly not broadcasting in this sense, 47 U.S.C. §§153(b) and (c); see *Cable Vision, Inc. v. KVVU, Inc.*, 211 F. Supp. 47 (D.C. Idaho 1962), *vac. and remanded on other grounds*, 355 F.2d 398, *cert. den.* 379 U.S. 989.

Ample precedent for treating broadband cable operators as common carriers is provided by Commission regulation of Telephone Companies which provide cable channel distribution facilities. See *General Telephone Co. of California v. F. C. C.*, 413 F.2d 390 (D.C. Cir. 1969), *cert. den.* 396 U.S. 888 and *General Telephone Co. of the Southwest v. U. S.*, — F.2d —, 22 R.R.2d 2179. In the latter case the Fifth Circuit Court of Appeals expressly reserved the question of "whether broadband cable services should evolve in a common carrier mode." 22 R.R.2d at 2181.

F.C.C. involvement in program content vis-a-vis broadcasting will come to prevail in the cable field.

2. The Program Origination Requirement Will Encourage the Cable Industry to Restrict the Opportunity for Free Expression.

If the cable industry is required—or even permitted—to enter the arena of program origination, there will be powerful economic incentives against its realizing the full technological advantages of cable as a carrier of diverse content and myriad educational and commercial services. This sad prognosis is confirmed by the history of American television broadcasting.

Television broadcasters derive their revenue from the selling of audiences to sponsors. The larger the audience they can deliver (by virtue either of presenting particularly popular programming, or operating in restricted television markets), the more they can demand and receive from sponsors who wish to advertise their goods and services. If cable carriers are required to enter the field of programming, they, like television broadcasters, will seek to preserve the largest possible audiences for themselves in the knowledge that advertising sponsors will pay them at a rate reflecting the number of viewers they deliver. Cable carriers will be unwilling to expand their carrier capacity to meet the demands of others when the effect of that expansion will be to reduce the audience for their own programs. The program origination requirement will, moreover, entail the diversion of cable companies' talent and capital resources which would otherwise be employed to the end of increased carriage capacity. Funds and personnel will be deflected to the acquisition of studio space, theatrical paraphernalia, production staff, and so on.

The program origination order of the FCC thus effectively constitutes a mandate to the cable industry to integrate programming and distribution functions along the pattern adopted by television broadcasters. Not only will program-originating cable operators be inspired to restrict their carrier capacity, they will also be discouraged from airing independently produced programs of interest to diverse segments of their viewing audience. As programmers, cable carriers will be in the business of selling audiences to sponsors at the lowest possible cost to themselves. They attempt to gain the largest audience for themselves by seeking to distribute the kinds of mass entertainment programs which can capture it, and they will naturally seek to maximize their profits from such programming by producing their own shows. This diversity-inhibiting effect of the vertical integration of the programming and distribution functions has been amply demonstrated in the development of network programming. See, for example, the FCC Report and Order released on May 7, 1970 (re Amendment of Part 73 of the Commission's Rules and Regulations Dkt. No. 12782), determining that ABC and CBS each had important financial interests in more than 96% of all evening (6:00-11:00 P.M.) entertainment programming, other than feature films, carried on their networks.

It is clear that integration of the programming and distribution functions leads to diminished diversity in pro-

⁴ For the tendency of broadcasters to maximize their audiences by serving modal tastes, see Peter Steiner, "Program Patterns and the Workability of Competition in Radio Broadcasting," *Quarterly Journal of Economics*, LXVI (May 1952); Jerome Rothenberg, "Consumer Sovereignty and the Economics of TV Programming," *Studies in Public Communications* (Fall 1962).

gramming as control is concentrated in the hands of those whose primary corporate responsibility is to select commercially saleable material which promises to capture the largest possible audience in each viewing hour. Equally clear is the fact that access to the medium of television is increasingly denied those program producers who are not in some way affiliated with the distributor. The anti-competitive integration of the programming and distribution functions thus tends to deprive the public of a rich diversity of ideas and views which could otherwise be available to it.⁵

It is worth noting that Anti-Trust legislation, designed to promote the free flow of goods, services, and ideas, has historically been concerned not only with those arrangements which actually inhibit competition, but also with arrangements which merely tend, or could tend to diminish it. Thus, in *United States v. Terminal Railroad Ass'n.*, 224 U.S. 883 (1912), the Court refused to sustain an agreement in the form of a corporate charter under which six of twenty-four railroad companies operating in the St. Louis metropolitan region maintained exclusive control of the bridge and ferry routes out of the city. The Court's concern at the anti-competitive potential of the arrangement allowed it to reach this result while acknowledging that "the proprietary companies have not availed themselves of the full measure of their power to impede free competition of outside companies . . ." 224 U.S. 383, at 389. See also, *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, (1930), in which the Court, while noting that the fundamental interest protected by the Sherman Anti-Trust Act was that of "the public in the preservation of competition . . ." denied that the Act required a showing "that the challenged arrangement suppresses all competition. . . ." 282 U.S. 30, at 34.

In *United States v. Paramount Pictures Inc.*, 334 U.S. 131 (1948), the Court was specifically concerned at the anti-competitive effect of ownership by movie producers in theatres which could exhibit their films. It affirmed the order of the District Court under which producers were required to divest themselves of interests in exhibiting theatres where such interests were prima facie, or in intent and effect, anti-competitive.

CONCLUSION.

The Commission's program origination requirement reflects a regulatory policy which is inconsistent with the nature and potential of emerging broadband cable technology. The requirement will serve to inhibit the potential of that technology to provide an important outlet for the free expression of ideas. For this reason, its issuance was without the statutory and constitutional authority of the Commission, and accordingly, the decision below should be affirmed.

Respectfully submitted,

MELVIN L. WULF

LAWRENCE G. SAGER

SCOTT ROBB

RONALD S. REICH

American Civil Liberties

Union Foundation

156 Fifth Ave.

New York, N. Y. 10010

*Attorneys for Amicus**

* Attorneys for *Amicus* gratefully acknowledge the assistance of Gerald McFarren, who is a third year student at the School of Law, Columbia University.

APPENDIX

Sources on the Technological and Economic Feasibility of Broad Band Communications Systems

1. "Hitches in the Cable"—Sidney W. Dean, Jr., *The Nation*, July 20, 1970, pp. 41-45.
2. "Cable TV Leaps Into The Big Time," *Business Week*, Special Report: November 22, 1969.
3. "On the Economics of Wired City Television," *The American Economic Review*, H. F. Barnett and E. Greenberg, pp. 503-508.
4. "Public Policy and Emerging Technology in the Media." Bruce M. Owen, J.F.K. School of Government, Harvard University, Summer 1970.
5. "The Wired Nation," Ralph Lee Smith, *The Nation*, Special Issue, May 18, 1970.
6. *National Businessman's Council*, Testimony on 6700-A in Assembly, N.Y. (An Act . . . in relation to the creation of a state commission on cable television . . .), July 8, 1970.
7. "Toward a Modest Experiment in Cable Television," Stephen White, *The Public Interest*, ; pp. 52-66.
8. A Proposal for Wired City Television," Harold F. Barnett and Edward Greenberg, *Washington University Law Quarterly*, Vo. 1968, Winter 1968, No. 1, pp. 1-26.

9. "Regulation of Community Antenna Television," *Columbia Law Review*, Vol. 70, May 1970, No. 5, pp. 837-875.
10. Public Services Commission State of New York, Report of December 1970 on "Regulation of Cable Television by the State of New York," especially at 219.
11. Electronic Industries Association: Industrial Electronics Division Response to 2CC Docket 18397, part V, October 27, 1969.

COURT, U. S.

Supreme Court, U. S.
F 112 13 D

APR 3 1972

MICHAEL RODIN, JR. CL

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and FEDERAL
COMMUNICATIONS COMMISSION, *Petitioners*,

v.

MIDWEST VIDEO CORPORATION

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit

BRIEF FOR MIDWEST VIDEO CORPORATION

WAYNE W. OWEN
Union Life Building
Little Rock, Arkansas 72201

HARRY M. PLOTKIN
GEORGE H. SHAPIRO
DAVID TILLOTSON
1815 H Street, N.W.
Washington, D. C. 20006

Of Counsel: *Attorneys for Respondent*

MOSES, McCLELLAN, ARNOLD,
OWEN & McDERMOTT
Union Life Building
Little Rock, Arkansas 72201

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006.

April 1972

INDEX

	Page
STATEMENT	1
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. The Mandatory Origination Rule Is Not An Appropriate Exercise Of The Commission's Jurisdiction Over Either Broadcast Stations Or CATV Systems	11
A. CATV Systems Are Not Broadcast Stations Within The Meaning Of The Communications Act And Are Not Subject To The Same Regulatory Authority Of The Commission As Are Broadcast Stations	11
B. The Mandatory Origination Requirement For CATV Systems Is Not Ancillary To Any Responsibility Which The Commission Has For The Regulation Of Broadcasting	19
II. The Mandatory Origination Rule Can Not Be Sustained On A Theory Of Benefit-Conferred ..	27
CONCLUSION	39

TABLE OF AUTHORITIES

CASES:

<i>Black Hills Video Corp. v. Federal Communications Commission</i> , 399 F. 2d 65 (8th Cir. 1968)	26
<i>Delaware, Lackawanna & Western R. Co. v. Morristown</i> , 276 U.S. 182 (1928)	10, 32
<i>Federal Communications Commission v. Schreiber</i> , 381 U.S. 279 (1965)	13
<i>Federal Power Commission v. Transcontinental Gas Pipe Line Corp.</i> , 365 U.S. 1 (1961)	7-8, 17, 18

	Page
<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968)	10, 28, 29, 30
<i>Frost & Frost Trucking Co. v. Railroad Commission</i> , 271 U.S. 583 (1926)	10, 32-33, 36
<i>Georgia Power Co. v. Georgia Public Service Commission</i> , 211 Ga. 223, 85 S.E. 2d 14 (1954)	33
<i>Hollywood Chamber of Commerce v. Railroad Commission</i> , 192 Cal. 307, 219 p. 983 (1923)	33
<i>Interstate Commerce Commission v. Oregon-Washington R. & Nav. Co.</i> , 288 U.S. 14 (1933)	10, 16, 32
<i>Jones v. State Board of Education</i> , 397 U.S. 31 (1970)	33
<i>Michigan Public Utilities Commission v. Duke</i> , 266 U.S. 570 (1925)	33
<i>Missouri Pacific R. Co. v. Nebraska</i> , 164 U.S. 403 (1896)	33
<i>Munn v. Illinois</i> , 94 U.S. 113 (1877)	28, 33
<i>National Broadcasting Co. v. United States</i> , 319 U.S. 190 (1943)	14
<i>Nebbia v. New York</i> , 291 U.S. 502 (1934)	29, 33
<i>Northern Pacific R.R. Co. v. North Dakota ex rel. McCue</i> , 236 U.S. 585 (1915)	10, 33, 35, 36
<i>Red Lion Broadcasting Co. v. Federal Communications Commission</i> , 395 U.S. 367 (1969)	14
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	33
<i>Slochower v. Board of Higher Education</i> , 350 U.S. 551 (1956)	33
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	33
<i>Stahlman v. Federal Communications Commission</i> , 126 F. 2d 124 (D.C. Cir. 1941)	13
<i>Terral v. Burke Construction Co.</i> , 257 U.S. 529 (1922)	33
<i>Thorpe v. Housing Authority</i> , 386 U.S. 670 (1967)	33
<i>Town of Beloit v. Public Service Commission</i> , 34 Wis. 2d 145, 148 N.W. 2d 661 (1967)	33
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 157 (1968)	3, 4, 8, 19, 26, 29
<i>Utah Power & Light Co. v. Public Service Commission</i> , 122 Utah 284, 249 P. 2d 951 (1952)	33
<i>Western Union Telegraph Co. v. Foster</i> , 247 U.S. 105 (1918)	33

ADMINISTRATIVE DECISIONS:

<i>Carter Mountain Transmission Corp.</i> , 32 FCC 2d 459 (1962), <i>aff'd sub nom. Carter Mountain Transmission Corp. v. FCC</i> , 321 F. 2d 359 (D.C. Cir. 1963), <i>cert. denied</i> , 375 U.S. 951 (1963)	3
<i>First Report and Order</i> , 38 FCC 683 (1965)	3, 27
<i>Memorandum Opinion and Order in Docket No. 18397</i> , 27 FCC 2d 778 (1971)	32
<i>Midwest Television, Inc.</i> , 13 FCC 2d 478 (1968)	4, 25
<i>Panagra Terminal Investigation</i> , 4 C.A.B. 670 (1944) ..	33
<i>Second Report and Order</i> , 2 FCC 2d 725 (1966)	3, 21

STATUTES:

Communications Act of 1934, as amended, 47 U.S.C. §§ 151 et seq.	7
Section 1	7, 15, 18, 24
Section 2(a)	8
Section 3(h)	15
Section 214	16
Section 301	15
Section 303(a)	20
Section 303(g)	15, 18, 24
Section 303(h)	20
Section 307(b)	7, 16, 18, 23
Section 308	15
Section 309	15
Federal Election Campaign Act of 1971, Public Law No. 92-225	7, 12, 13

	Page
REGULATIONS:	
Rules and Regulations of the Federal Communications Commission, 47 C.F.R., Part 73	38
Section 73.266	38
MISCELLANEOUS:	
Inquiry Into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" and the Orderly Development of Television Broadcasting, 26 FCC 403 (1959)	2
Senate Conference Report No. 92-580, 92d Cong., 1st Sess.	13

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA and FEDERAL
COMMUNICATIONS COMMISSION, *Petitioners*,

v.

MIDWEST VIDEO CORPORATION

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Eighth Circuit

BRIEF FOR MIDWEST VIDEO CORPORATION

STATEMENT

This case involves the question of whether the Federal Communications Commission ("the Commission") has the authority under the Communications Act of 1934 to require community antenna television ("CATV") systems to originate programs as a condition of their remaining in business. The United States Court of Appeals for the Eighth Circuit ruled in opinion below¹ that the Commission did not have such authority.

¹ The opinion below is reprinted as Appendix A to the Petition for Certiorari. The various appendices to the Petition for Certiorari will be cited herein as "Pet. App. —" with reference to the appropriate appendix.

In order to place this question in perspective, it is necessary briefly to review the history of the development of CATV regulation by the Commission. CATV had its inception in the late 1940's when systems commenced operation as a means of providing television signals to communities where normal television reception was poor or non-existent. At the outset, these systems were, for the most part, of limited capacity, providing service from generally no more than three television stations whose signals were captured directly off-the-air at a relatively high location and distributed by cable to subscribers. In these early stages of CATV development, the Commission at first largely ignored such operations and then, upon conducting an investigation of the matter, concluded that CATV was not an appropriate subject for Commission regulation.² As time progressed, the industry continued to grow and expand both in number of subscribers and number of television channels delivered to subscribers. In addition, CATV systems also began to distribute to their subscribers television signals originating from stations distant from the CATV community. Often these distant signals were delivered to the CATV system by means of microwave relay.³ In view of these developments, the Commission, commencing in 1962 on a case-by-case basis, began to reassess its role with respect to the CATV industry and to exercise jurisdiction over it

² See *Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" and the Orderly Development of Television Broadcasting*, 26 FCC 403 (1959).

³ Microwave relay involves receiving television signals at a favorable receiving location and transmitting them by means of an intermediate relay station to locations where the signal of the originating station could not be received directly off-the-air.

in acting on applications for microwave authorizations.⁴ Later, by rule making, the Commission asserted jurisdiction over all CATV operations where the television signals were received by means of microwave.⁵ Ultimately, finding the unregulated growth of CATV systems, whether receiving signals off-the-air or by microwave, could have an adverse effect upon the development of free over-the-air broadcasting, and in particular upon the growth and development of UHF broadcasting, the Commission assumed jurisdiction over all CATV operations by adopting rules and regulations designed to minimize the impact of CATV development on the growth and continued vitality of the television industry.⁶

The regulations adopted by the Commission during this period related entirely to those functions of CATV systems which involved reception of signals transmitted by broadcast stations and their simultaneous transmission by cable to subscribers. Thus, the rules dealt with the signals which a CATV system was eligible to carry, those which it was required to carry, program exclusivity requirements which CATV systems were required to afford various classes of television stations, and the procedures for implementing these provisions. The validity of these rules and regulations was sustained by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). In that decision, however, this Court emphasized that the only authority which

⁴ See *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff'd sub nom. Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359 (D.C. Cir. 1963), cert. denied, 375 U.S. 951 (1963).

⁵ *First Report and Order*, 38 FCC 683 (1965).

⁶ *Second Report and Order*, 2 FCC 2d 725 (1966).

it recognized the Commission to have over CATV was that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" and that it was expressing no view "as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." *Id.* at 178.

The rules and regulations relating to CATV systems considered by this Court in *Southwestern* were silent with respect to the right or obligation of CATV systems to originate programs of their own. By means of case law, however, the Commission did commence to address itself to this subject. Thus, in the administrative proceeding in *Southwestern*⁷ the Commission adopted an order with respect to one CATV system permitting it to originate some programs, but only on condition that no commercial sponsorships or commercial spots would be carried. Another system in the San Diego area was directed to originate programs (again on a non-commercial basis) as a condition of its right to import signals from Los Angeles.

On December 12, 1968, the Commission adopted its *Notice of Proposed Rule Making and Notice of Inquiry* 15 F.C.C. 2d 417,⁸ instituting the proceedings which resulted in the promulgation of the rule which is the subject of this proceeding. In the *Notice*, the Commission announced its tentative conclusion "that, for now and in general, CATV program origination is in the public interest" but that "there may be a need for some regulation thereof, in order to insure operation

⁷ *Midwest Television, Inc.*, 13 F.C.C. 2d 478 (1968).

⁸ The *Notice of Proposed Rule Making and Notice of Inquiry* is reprinted at pages 3-50 of the separate joint appendix to Petitioners' Brief which will be cited herein as "JA."

fully consistent with the public interest in the larger and more effective use of radio.”⁹ Accordingly, the Commission requested comments on two principal subjects. First, the commission asked whether it should impose upon some CATV systems a mandatory requirement of program origination. Specific suggestions were sought as to the minimum size of installation which should be subject to the mandatory origination requirement. Second, with respect to CATV program origination (whether voluntary or pursuant to the mandatory requirement) the Commission asked what economic basis should be permitted for such operations (e.g., commercial sponsorship) and what detailed operating rules should be prescribed in such areas as political broadcasts, fairness, sponsorship identification, and the like.

The Commission after considering the comments and submissions made by interested persons adopted a Report and Order and later a Memorandum Opinion and Order denying petitions for reconsideration (Pet. App. C and D). In these documents the Commission pointed out (Pet. App. C at 32) that there was general agreement by the CATV interests that program origination served the public interest and should be encouraged; broadcast interests took a contrary position. However, both CATV and broadcast interests were virtually unanimous in opposing mandatory origination. The Commission in its Report adhered to the view set forth in its Notice that it had the authority to compel CATV systems to originate programming and that the public interest would be served by the exercise of its authority. Addressing itself to the question as to which systems should be subjected to this require-

⁹ JA at 7.

ment it set the figure at CATV systems having 3,500 or more subscribers. In so doing it relied upon cost estimates furnished to it by a manufacturer of cablecasting equipment (Pet. App. C at 39-40) which purported to show that the construction costs for cablecasting systems would range from \$27,300 for a basic black and white system to \$95,000 for a full color system and that annual operating costs would range from \$14,300 for black and white systems to approximately \$33,000 for color operations. The Commission concluded that no CATV system with 3,500 or more subscribers should be permitted to be or remain in the business of providing television broadcast signals to their subscribers unless "the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services." (Pet. App. C at 43, 53). Specific regulations to that effect were adopted by the Commission.¹⁰

Following the issuance of these regulations Respondent filed its Petition for Review. The Court below held that the mandatory origination rule was beyond the Commission's authority.

¹⁰ In the same proceeding the Commission also adopted rules and regulations governing program originations by CATV systems, whether undertaken voluntarily or pursuant to the Commission's mandatory origination rule. Pet. App. C at 53-55; Pet App. D at 62-63. These rules and regulations are of the same character as are applicable to broadcast stations in such areas as equal time for political candidates, fairness, lotteries, sponsorship and pay-TV programming. The Court below did not pass on the validity or invalidity of these provisions.

SUMMARY OF ARGUMENT

I.

A.

The Commission does not have the same jurisdiction over CATV as it does over broadcast stations. While the Government asserts that the Commission does have such jurisdiction, it cites no provision in the Communications Act to justify this conclusion. Its reliance on the recent Federal Elections Campaign Act is misplaced. While the Act includes CATV systems under the definition of broadcasting stations for the purposes of the Federal Elections Campaign Act it is clear both from the language of the Act and its legislative history that this definition is not for the purposes of the entire Communications Act but only with respect to the sections of the Act relating to political expenditures.

Moreover, even if it be assumed *arguendo* that a CATV system is a broadcast station for regulatory purposes, no showing has been made how this justifies the mandatory origination rule. The objective of the Communications Act is stated in Section 1 (47 U.S.C. § 151) to make efficient radio service available to all people of the United States. The method for achieving this objective so far as broadcasting is concerned is set forth in Section 307(b) of the Communications Act (47 U.S.C. § 307(b)) which directs the Commission to make as equitable allocation of broadcast facilities among the several states and communities but only "when and insofar as there is demand" for licenses, and modifications or renewals thereof. Under this grant of authority the Commission can choose amongst competing applicants or even deny an uncontested application on an inferior end-use theory (*Cf. Federal*

Power Commission v. Transcontinental Gas Line Pipe Corp., 365 U.S. 1 (1961)). but cannot compel a person against his will to enter the broadcast business or to erect a station in a community not of his choice—no matter how well equitable allocation principles would be served by a station in such community. There is even less statutory justification for compelling CATV systems to undertake programming functions.

B.

This Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) upheld previous CATV regulations of the Commission on the ground that CATV operations are interstate communication by wire or radio within the meaning of Section 2 of the Communications Act (47 U.S.C. §152) and the particular CATV regulations were reasonably ancillary to the effective regulation of television broadcasting. The requirement that CATV systems originate programs has no ancillary relationship to the regulation of broadcasting.

The statutory responsibilities of the Commission to which the regulation of CATV operations has been found to be ancillary are five-fold:

- (1) Establishment of areas or zones to be served by broadcast stations;
- (2) Protection of television broadcast stations from unfair competition from CATV operations;
- (3) Fostering the development of a nationwide television broadcast service through the maximum possible utilization of UHF channels;
- (4) Allocation on a fair, efficient and equitable basis of broadcast facilities among the several states and communities; and

- (5) Making available radio service to all of the people of the United States and encouraging the larger and more effective use of radio.

The requirement that CATV systems originate their own programs cannot possibly aid in the achievement of any of these objectives. Therefore, such a requirement cannot be deemed to be ancillary to the accomplishment of any of the objectives which the courts have heretofore recognized as having been entrusted to the Commission under the Communications Act of 1934.

II.

Mandatory program origination cannot be imposed on the theory that since CATV systems receive a benefit through carrying broadcast signals they can be compelled by the Commission to undertake affirmative action in exchange for this benefit which the Commission finds to be in the public interest. This basis for asserting authority to require CATV systems to engage in program origination is premised on the assumption that CATV systems are "authorized" by the Commission to carry broadcast signals and that the Commission has authority to withhold such authorization, or to grant it subject to whatever conditions it may deem appropriate. The right to carry broadcast signals and distribute them to subscribers, however, is not conferred upon CATV systems by the Commission. Although the Commission does have authority under the Communications Act to impose appropriate restrictions upon the reception and distribution of broadcast signals, the right of CATV systems to receive and distribute such signals is not itself conferred by the Commission. Broadcast signals are dedicated to the public by broadcast stations and the right to receive and distribute them may be exercised by anyone with the

capacity to capture such signals off the air. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

Even assuming that the right to receive and distribute broadcast signals is conferred upon CATV systems by the Commission and can, therefore, be withheld altogether or granted subject to reasonable conditions, it is clear that this right could not be conditioned upon CATV systems entering into the entirely different activity of cablecasting. *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583 (1926); *Northern Pacific R.R. Co. v. North Dakota ex. rel McCue*, 236 U.S. 585 (1915); *Delaware, Lackawana & Western R. Co. v. Morristown*, 276 U.S. 182 (1928); *Interstate Commerce Commission v. Oregon-Washington Railroad & Nav. Co.*, 288 U.S. 14 (1933).

ARGUMENT

The Commission by its mandatory-origination rule has entered into a new and distinct phase of regulating CATV activities. In its prior actions it dealt exclusively with the reception functions of CATV systems. Those regulations were designed to control or limit CATV reception activities in an effort to protect the viability of television broadcast operations and to insure that these reception functions were consistent with the statutory objectives underlying the regulation of broadcast stations. By the instant action the Commission is entering a whole new field of activity. By administrative fiat it proclaims to all persons now in the CATV business or those who enter in the future that they may not confine themselves to the legitimate activity of receiving and distributing broadcast signals but that they must become program originators—if they choose not to do so they must terminate their CATV activities entirely.

The Government in its Brief argues that the Congress has given the Commission broad authority over all interstate and foreign communication by wire or radio and over all persons engaged in such communication. Building on this premise two different justifications for the Commission's rule are set forth. First, the regulation is an appropriate exercise of the Commission's authority with respect to interstate communication by wire or radio on the alternative theory that CATV systems are in effect broadcast stations or that the mandatory-origination requirement is reasonably ancillary to the Commission's responsibilities for the regulation of television broadcasting. Second, since CATV systems derive their basic or sole economic nurture from broadcasting, they are an integral part of broadcast transmissions and their enjoyment and retention of the economic benefits of the carriage of broadcast signals subjects them to the pervasive jurisdiction of the Commission. Neither point is well taken.

I.

THE MANDATORY ORIGATION RULE IS NOT AN APPROPRIATE EXERCISE OF THE COMMISSION'S JURISDICTION OVER EITHER BROADCAST STATIONS OR CATV SYSTEMS

A.

CATV Systems Are Not Broadcast Stations Within the Meaning of the Communications Act and Are Not Subject to the Same Regulatory Authority of the Commission as Are Broadcast Stations

The Government has advanced a novel argument in this Court to sustain its mandatory origination rule.¹¹

¹¹ This particular argument is made for the first time in this Court. This ground was not articulated by the Commission itself in the Reports which adopted the rule in issue nor was the argument made in the Government's Briefs in the Court below.

It urges that CATV systems are in effect broadcast stations for the purposes of the Communications Act and that accordingly the Commission has "essentially the same jurisdiction over CATV that it has over the broadcasting industry." (Br. 13) It cites no provision in the Communications Act on which it purports to rely for this conclusion. Instead, it constructs a fanciful argument based upon sheer assumption and speculation.

First, reference is made (Br. 13, fn. 10) to the Federal Election Campaign Act of 1971, Public Law No. 92-225, and in particular Section 104 which it cites as authority for the proposition "that the current Congress appears to assume that the Commission has broad authority to regulate CATV." The material cited has no bearing at all on the subject; in fact it points in the opposite direction. What Congress has done in Section 104 is to impose certain limitations on expenditures which may be made by candidates for Federal office. A limitation is set forth governing expenditures in all "communications media" which is defined (in Section 102 of the Act) to include broadcasting stations, newspapers, magazines, outdoor advertising facilities and telephone." No more than 60% of such amounts may be spent for use of broadcasting stations. The provision is then added that "for the purposes of this section" (not for the purposes of the entire Communications Act) the "term 'broadcasting station' includes a community antenna television system." Far from supporting the Government's argument Section 104 strongly implies that a CATV system is not a broadcasting station under the Communications Act. It takes a special statutory provi-

sion to make it so even for the limited purposes of political expenditures.¹²

Of equal flimsiness is the Government's attempt to find comfort in the fact that reporting requirements contained in the Senate Bill which became the Federal Election Campaign Act of 1971 were eliminated in conference because as stated by the Conference Committee "the FCC has adequate authority to require reports under existing law." However, the eliminated section required "broadcasting stations and candidates to file such reports as were required under FCC regulations." (S. Conf. Rep. No. 92-580, 92d Cong. 1st Sess., p. 26) The deletion of this section connotes no greater Commission jurisdiction over CATV than over candidates. The Commission has long had the authority to obtain information from persons not subject to its direct regulatory jurisdiction. *Federal Communications Commission v. Schreiber*, 381 U.S. 279 (1965); *Stahlman v. Federal Communications Commission*, 126 F2d 124 (D.C. Cir. 1941).

Second, the contrived argument is made (Br. 13) to the effect that it "seems logical" that if Congress had foreseen the development of CATV it would have wanted that industry to be regulated in furtherance of the same policy objectives that obtain with respect to the broadcast industry. Certainly more than such a statement is required for jurisdiction. Even if

¹² This reading is reenforced by the language of the Conference Report (S. Conf. Rep. No. 92-580, 92d Cong. 1st Sess., p. 27) to the effect that the "definition of broadcasting station incorporates the definition of broadcasting station used for purposes of the Communication Act, but adds to that definition community antenna television systems."

CATV and broadcasting were essentially the same, it would not necessarily follow that the same regulatory power was conferred by Congress over both industries unless a statutory basis can be shown for such a result. But the fact remains that the two industries are not the same. For as the Government itself recognizes (Br. 13-14) regulation of broadcasting is bottomed upon the need to allocate the limited resources of the broadcast spectrum—a scarcity factor which, the government admits, is not present in the case of CATV. Nevertheless the Government blithely brushes the point aside by simply asserting (Br. 14): “In all other respects, however, there is as much need for the Commission’s regulation of CATV as of broadcasting.” Such self-seeking statements do not create jurisdiction. This Court has recognized that the scarcity factor involved in broadcasting is an important foundation for the constitutional existence of Commission power over programming by broadcast stations—a power which may lack constitutional foundation in the case of non-scarce communications media. *Red Lion Broadcasting v. Federal Communications Commission*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Whether Congress can confer on the Commission the same authority over CATV that it possesses over broadcasting is not in issue here. But certainly the absence of the vital element of scarcity in the case of CATV is so fundamental that the existence of the authority claimed must be clearly shown by Congressional action—not simply by “it seems logical” recitations. No such congressional grant of authority has been shown to exist.

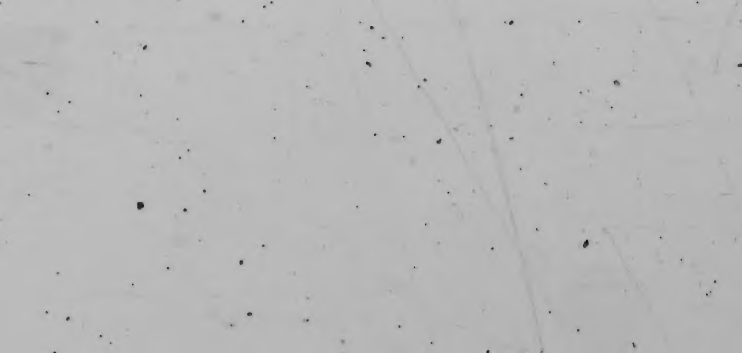
Finally, even if the Government’s premise is accepted—i.e. that a CATV system is a broadcast station for

regulatory purposes—it does not follow that a mandatory origination rule would be valid. The Government assumes that result; it makes no effort to prove it. In fact, the statutory scheme is to the contrary.

The Communications Act forbids any person from operating a broadcast station without first obtaining a license from the Commission (Section 301 of the Communications Act, 47 U.S.C. § 301). Only qualified persons may obtain licenses and they are required to operate in the public interest (47 U.S.C. §§ 308, 309). The Commission is given specific authority to promulgate rules, regulations and policies governing the operation of the stations to make sure that the public interest is served. But nowhere is there any suggestion that a person may be compelled to enter broadcasting. Yet that is precisely what the Commission is undertaking to do by its mandatory origination rule.

The Government seeks to justify its action by relying on Sections 1 and 303(g) of the Communications Act (47 U.S.C. §§ 151 and 303(g)). The reliance is misplaced. Section 1 states that the purpose of the Act is “to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.” Section 303(g) directs the Commission to “encourage the larger and more effective use of radio in the public interest.” These Sections, however, confer no authority as such on the Commission. They simply set forth statutory objectives; the achievement of these objectives must be by means of powers set forth in other portions of the Act. Broadcasting is specifically declared by Section 3(h) (47 U.S.C. § 153(h)) not to be a common carrier. Hence, entry into the field is voluntary and no power exists to force a broadcaster to ex-





pand his chosen field of activity—in contrast to common carriers where Section 214 of the Communications Act (47 U.S.C. § 214) specifically authorizes the Commission under closely defined standards to require carriers to expand their activities.¹³

In the field of broadcasting the manner of achieving the objective of making efficient radio service available to all people of the United States is set forth in Section 307(b) (47 U.S.C. § 307(b)). This section directs the Commission to make an equitable allocation of broadcast facilities among the several states and communities but only “when and insofar as there is demand” for licenses and modifications and renewals thereof. In other words, the Commission is not given a *carte blanche* to initiate broadcast stations. It cannot compel a person against his will to enter the broadcast business. Nor can it compel a person who desires to locate a station in city X to apply for a station in city Y even though city Y may have a greater need for the facilities than city X. The only power available to it is to choose between competing applicants for the same facilities to be utilized in different communities, denying the application for city X as against one requesting the same facilities in city Y, if there is a greater need for the station in city Y than in X. But the Commission cannot compel an applicant desiring to locate in

¹³ Even common carriers operating under statutes with provisions similar to Section 214 cannot be constitutionally compelled under guise of an order ostensibly to extend their existing lines to undertake to construct what is in effect a new line simply because the regulatory agency believes the area in question urgently needs service. *Interstate Commerce Commission v. Oregon-Washington Railroad & Nav. Co.*, 288 U.S. 14 (1933).

city X to specify city Y because of the greater possible need for service in city Y.¹⁴

¹⁴ The end-use theory of regulation upheld by this Court in *Federal Power Commission v. Transcontinental Gas Line Pipe Corp.*, 365 U.S. 1 (1961) is in accord with the delineation of Commission jurisdiction described above. The Government (Br. 17) cites *Transcontinental* but does not explain its purported significance. In the Court below the Government relied heavily on this case and its end-use regulation theory as establishing the right of the Commission to condition CATV carriage of broadcast signals on such CATV systems becoming program originators. The Court below (Pet. App. A p. 25) held that the reliance is misplaced.

Transcontinental involved an application by a pipe line company for a certificate of public convenience and necessity permitting the interstate transportation of natural gas which a public utility had purchased directly from a producer. The direct sale of the gas from the producer to the public utility was clearly beyond the scope of the Power Commission's regulatory authority; however, the pipe line company which contracted to deliver the gas from the producer to the public utility could not transport the gas without obtaining a certificate of public convenience and necessity from the Power Commission. The Power Commission denied the application for a certificate on the ground, among others, that the gas was to be transported for use under industrial boilers, a use deemed to be "inferior" from the standpoint of conserving a valuable natural resource. This Court held that it was appropriate for the Power Commission to take into account the use which would be made of the transported gas in determining whether the issuance of the requested certificate would be in the public interest. Thus, even though the Power Commission could not directly regulate the use to which the public utility proposed to devote the gas, the Court held that the use could be weighed by the Power Commission in exercising its jurisdiction over the certification of pipe line transmission of gas. While sustaining the Power Commission's authority to refuse a certificate because of "end use" considerations, this Court was careful to point out that the agency could not go beyond the denial of a certificate to prevent an inferior use and require the gas to be devoted to an "end use" which it favored. The Court stated (365 U.S. at 17):

The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power

Other analogies can also be found in the broadcast field. Broadcasting commenced in the standard broadcast field (AM broadcasting). Then came FM broadcasting and finally television. At the outset great risks were involved in commencing operation in these new fields. When these new services were being established, it was Commission policy to encourage AM operators to enter the FM and TV field; the inducements were particularly manifest with respect to UHF operation. Yet, neither the Commission nor anyone else ever suggested that the Commission's authority under Sections 1, 303(g) and 307(b) was broad enough to compel such AM operators to construct FM or television stations. Desirable as is the objective to have all people of the United States enjoy FM or television broadcast service, there is no basis for concluding that the Commission could order the owner of an AM station to construct and operate an FM or TV station in the same community or elsewhere.

By the same token it is difficult to see how a CATV system engaged in reception activities can be compelled by the Commission to undertake program origination activities. Merely calling CATV a broadcast station creates no such power. Nor is Commission power established by the plaint (Br. 14) that from the standpoint of the television viewer government regulation of CATV is necessary because the viewer can easily flip the dial between broadcasting and cablecasting chan-

over proposed transportation and it can only do this when a balance of all the circumstances weighs against certification.

Consistent with *Transcontinental* the Commission can in assigning scarce radio frequencies weigh the use to which they will be put. But having assigned such frequencies and having made its "end-use" determination, it cannot take the next step of forcing the user of radio frequencies to undertake a different activity.

nels. Without regulation of CATV, the Commission fears, important policies such as equal opportunities for candidates, fairness, etc. would be undermined. But this is beside the point. The most that this argument can prove is that if CATV systems do originate programming, Commission program regulations should apply to them. But as has been pointed out the Commission has promulgated rules governing CATV program operations and the opinion of the Court below has not affected their validity. But merely because the Commission may have authority to regulate the conduct of CATV programming does not mean that the Commission can compel a CATV system to originate programs.

B.

The Mandatory Origination Requirement for CATV Systems Is Not Ancillary to Any Responsibility Which the Commission Has for the Regulation of Broadcasting

The Government in reluctant recognition that this Court's holding in *Southwestern* restricted its approval of the Commission's authority to regulate CATV to regulation "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (392 U.S. at 178) has made an effort to address itself to the ancillary nexus between mandatory origination and broadcast objectives. However, it does so not by an affirmative showing of what broadcast objectives are served either directly or in an ancillary manner by mandatory CATV origination but rather by characterizing the opinion of the Court below as holding that "Congress intended to restrict the Commission to regulation designed to prevent deleterious competition with the broadcasting industry" (Br. 16). This is not an accurate reading of the Court's opinion. It found

absence of Commission jurisdiction based upon a showing in the briefs that no ancillary relationship existed between the mandatory origination rule and any responsibility the Commission has with respect to television broadcasting.

The broadcasting statutory objectives to which CATV regulation has been said to be ancillary have been spelled out by the Commission in its various decisions and reports and orders. The following five objectives have been relied upon:

1. The power to establish areas or zones to be served by broadcast stations.

2. The power to protect television broadcast stations from the unfair competition of CATV.

3. The power to protect and foster UHF stations.

4. The accomplishment of the objectives of Section 307(b) of the Act.

5. The duty to make radio service available and to encourage the larger and more effective use of radio.

The mandatory origination rule is irrelevant to all of these objectives.

1. *The power to establish areas or zones to be served by broadcast stations*—Section 303(a) of the Communications Act (47 U.S.C. §§ 303(a)) authorizes the Commission to classify radio stations and Section 303(h) (47 U.S.C. § 303(h)) authorizes the Commission to prescribe the areas or zones to be served by radio stations. Under this authority the Commission has

asserted jurisdiction to compel CATV systems to carry local signals—this is deemed to be ancillary to the Commission's responsibility to assure that each station is capable of being received on all sets located in its prescribed service area—and to prohibit the unrestricted importation of distant signals—this is deemed to be ancillary to the Commission's responsibility to prevent a station's signal from being extended beyond the area the station is designed to serve (unless a showing is made that such extension will serve the public interest). The requirement that CATV systems originate programs just has no relationship whatsoever to either objective.

2. *The power to protect television broadcast stations from the unfair competition of CATV*—Throughout the Commission's reports¹⁵ adopting CATV rules and regulations runs the theme that CATV systems, in carrying the signals of broadcast stations, pay no fee for copyrighted programs and hence have an unfair competitive advantage against local television stations which must pay for their programs. The point is made that the CATV system, by bringing in signals not readily available in the market, fractionalizes the audience available to the local television stations and hence tends to deny local stations some of the economic means necessary for them to operate and pay for programs. This is deemed to be unfair competition and the Commission believes that regulation of CATV systems is reasonably ancillary to its duty with respect to television broadcasting by limiting or eliminating the effects of this unfair competition.

¹⁵ See, e.g. *Second Report and Order*, 2 F.C.C. 2d 725, 778-81 (1966). *Notice of Proposed Rulemaking and Notice of Inquiry*, J.A., at 16-17.

It is difficult to see how the subject of compelled origination of programs by CATV systems has any relationship whatsoever to the concept of unfair competition. While television broadcast stations may be understandably concerned with a new medium competing with them by originating programs, the plain fact is that so far as mandatory origination is concerned such competition flows not from CATV volition but from Commission-compelled conduct. Far from insulating television stations from CATV activity, the Commission's order pits CATV directly against television stations and forces CATV systems to compete with television stations both for audience and advertisers. We would have a classic case of bootstrapping if the Commission could base its power on its own order requiring CATV systems to originate programs and then justify such order on the basis that the originated programs may have competitive effects on television broadcast stations.

3. *The power to protect UHF stations*—The Commission has gone to great lengths to explain the importance of UHF stations: with only 12 VHF channels, effective utilization must be made of the 57 VHF channels if a truly nationwide system of television is to exist. The economic difficulties UHF stations confront and the adverse effect on their operations implicit in unrestricted CATV activities are of concern to the Commission. It is a well established fact that television operations are expensive and hence require relatively large markets to provide an economic base for viability. Thus, the Commission has concluded that the top 100 television markets are the ones which can generally be regarded as the most likely to provide adequate economic support for UHF operations.

Uncontrolled CATV activity in such top 100 markets could, according to the Commission, prove detrimental to UHF development and thus frustrate the Commission's utilization of UHF to achieve its overall allocations goals.

While the CATV industry has not conceded that Commission fears for UHF from CATV operation are real or well founded, the short answer so far as mandatory origination is concerned is that the Commission's action has no possible relationship to aiding UHF stations. First, the mandatory origination requirement is not limited to the top 100 markets where the Commission focuses its concern for UHF stations. Second, and more importantly, it is not possible to show how UHF stations are in any way aided by a Commission order requiring CATV systems to originate programs. If anything, arguments and policy considerations previously relied upon by the Commission for protecting UHF point in a direction exactly opposite to mandatory program origination.

4. *The Accomplishment of the Objectives of Section 307(b)*—Section 307(b) of the Communications Act (47 U.S.C. § 307(b)) directs the Commission in passing upon applications for broadcast stations to make a fair, efficient and equitable allocation of stations among the several states and communities. The regulation of CATV reception functions is deemed to be ancillary to this section because the undue importation of signals may cause broadcast stations to lose their economic ability to survive. If this happens, the mandate of Section 307(b) is disturbed in that there is a reduction in the number of broadcast stations available to the several states and communities.

It is difficult, however, to see how a requirement that CATV systems originate programs is in any way related to this objective. Indeed, the mandatory origination of programs can, if anything, have the same effect on local television stations as the importation of signals. While CATV systems which voluntarily originate programs do perform a valuable function in providing a new voice in the community, it is difficult to see how a mandatory requirement for that purpose can be said to aid the Commission in preserving the availability of broadcast stations to the several states and communities.

5. *The duty to make radio service available and to encourage the larger and more effective use of radio.* Section 1 of the Communications Act (47 U.S.C. § 151) states that the purpose of the Act is "to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service". Section 303(g) (47 U.S.C. § 303(g)) directs the Commission to encourage the larger and more effective use of radio in the public interest. From these two sections the Government argues that, pursuant to this mandate, the Commission can require mandatory origination of programs so that a maximum number of communities will have their own outlets for local self-expression.

However, as has been pointed out with respect to a similar argument as to broadcast stations (supra pp. 15-16) these provisions merely state objectives; the achievement of these objectives must be by means of power set forth in other portions of the Act. In the broadcast field itself we have already shown that the Commission has been given no authority to compel this result. It can only encourage the process by making

frequencies available and by passing upon applications for stations by qualified applicants.

The same rationale obtains in the CATV field. A person who enters into the CATV business, does so for the purpose of receiving television signals and distributing them to subscribers. Traditionally, these functions have been carried out by CATV systems distributing in an unaltered manner the programs of the originating stations. This activity by CATV has been held to be communication by wire or radio and subject to reasonable Commission regulation. The CATV operator may, if he chooses, also engage in other business activity. He may publish a newsletter, produce programs, provide fire or burglary services, or any other type of activity. Whether such activities, if voluntarily undertaken, would be communication by wire or radio and subject to Commission jurisdiction is a moot matter. But to say that the Commission can order the CATV system to undertake such additional activities because they are desirable services, would be to confer upon the Commission the authority to impose more stringent conditions on the conduct of activities ancillary to its area of primary responsibility than it can impose upon its broadcast licensees.¹⁶

¹⁶ It is anomalous to compare the Commission's expressed concern about its obligation to encourage the larger and more effective use of radio in the public interest by requiring CATV systems to originate programming with its actions with respect to CATV voluntary originations. Prior to the instant proceeding Commission policy was directed to discouraging CATV systems from originating programming by forbidding CATV systems to sell time to advertisers to support the programming. See e.g. *Midwest Television, Inc.*, 13 FCC. 2d 478 (1968). Even in the instant proceeding the Commission is not wholly committed to the idea of program origination by CATV. Thus the Commission's rules provide (see Pet. App. C, at 45, 55) that a CATV system may sell

The Government (Br. 19) expresses the fear that "denial of jurisdiction in the Commission to regulate CATV systems which transmit broadcast signals would open the door to disparate state and local regulation of CATV services in contravention of the objectives of uniform and integrated regulation which Congress sought to achieve." But no argument is being made here that the Commission has no jurisdiction to regulate CATV systems which transmit broadcast signals. Both this Court in *Southwestern* and the Court below in an earlier opinion (*Black Hills Video Corp. v. Federal Communications Commission*, 399 F. 2d 65 (1968)) sustained Commission jurisdiction when the regulation of CATV was reasonably ancillary to broadcast objectives. Nor did the Court below in the instant case pass upon the authority of the Commission to adopt regula-

commercials only at the beginning and ending of each program and at natural breaks; no such restriction is imposed upon commercial broadcasters. Moreover, the Commission's Memorandum Opinion and Order in this proceeding (Pet. App. D, at 59-61) expressly warns CATV systems that if their origination of programming is too successful and attracts too large an audience the Commission might find it necessary to limit such program endeavors by preventing CATV from carrying programs of the type which have proved to be most popular on television and it is told that this will happen "at the first indication of the need therefor."

In light of this history of Commission attitude it is ironic to read in the Government's Brief (p. 18) that "cablecasting by CATV operators now provides a practical means for augmenting program diversification beyond the limitations inherent in the broadcast spectrum—a means that will be wasted if CATV operators are permitted to transfer the same limitations into their own activities by restricting their operations to the transmission of broadcast materials." CATV systems do not so desire to restrict their activities. They want to be free to originate programming, but not compelled to do so. The Commission would compel origination but would place obstacles in the path of effective programming by CATV operators.

tions governing programming undertaken by CATV systems. What the Court below held was that the Commission could not compel CATV systems to originate programming. But the absence of such a power would no more open the door to disparate state and local regulation of CATV than has the absence of Commission power to compel persons to operate broadcast stations.

II.

THE MANDATORY ORIGINATION RULE CANNOT BE SUSTAINED ON A THEORY OF BENEFIT-CONFERRED

Both in the Commission's opinions adopting the mandatory origination rule¹⁷ and in the Government's Brief the attempt is made to construct the "requisite nexus" between the mandatory origination rule and the Commission's statutory responsibilities by arguing that, since the principal product of CATV systems is the retransmission of broadcast signals and since CATV systems "serve the same functions in many areas as broadcasters", CATV operators may be required "to meet some of the same basic standards of responsibility to the public that are imposed on broadcasters." (Br. 17) The short answer to this argument is that CATV systems do not serve the same function as broadcasters unless they originate programs. And it is the right of CATV operators to refrain from being compelled to originate programs and still remain in business which is the only issue involved in this case. The question as to the power of the Commission to require CATV operators who do originate program to meet the same basic responsibilities to the public as

¹⁷ See e.g. *First Report and Order*, Pet. App. C, at 34, 38, 39, 48; 50-51, 52; *Memorandum Opinion and Order*, Pet. App. D, at 59-61.

broadcasters was not passed upon by the Court below and the Commission's detailed rules and regulations which are designed to achieve this objective remain in full effect.

In its simplest terms the Commission's rationale is that the mandatory origination rule may be sustained on the grounds that it is a quid pro quo for a benefit conferred upon CATV systems by the Commission. The benefit conferred is that CATV systems earn their revenues by carrying broadcast signals, that this carriage of signals takes place only pursuant to Commission authorization and that the continued carriage of the signals may, therefore, be conditioned upon the CATV systems undertaking other activities which the Commission deems to be in the public interest.

The Commission's benefit-conferred theory is subject to two defects. First, it is not true that the Commission confers authority upon CATV systems to receive broadcast signals and transmit them to subscribers. This is a right which exists independently of the Commission and which was exercised by CATV systems long before the Commission took cognizance of their activities. In this regard CATV is no different from the ordinary home owner who buys a receiver and installs an antenna or the manufacturer of television sets who constructs sets and sells them to the public so they can receive broadcast signals, or businessmen who construct and install antennas on homes enabling home owners to receive the signals which have been dedicated to the public by broadcast stations. *Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390 (1968). True, the activity of any such persons may constitute communication by wire or radio and hence be subject to appropriate Commission regulation.

It does not follow from the fact that the Commission may have the authority to regulate a communication activity in appropriate instances that the right to engage in the activity is conferred by the Commission. Cf. *Nebbia v. New York*, 291 U.S. 502, 531 (1934); *Munn v. Illinois*, 94 U.S. 113 (1877).

Secondly, even if it can be assumed *arguendo* that the right to engage in CATV reception activities is conferred upon the companies by the Commission and can be withheld in appropriate circumstances, this does not mean that the Commission can condition the exercise of the right upon the CATV operator relinquishing rights to which it is lawfully entitled or undertaking activities which the Commission has no independent authority to require. The holding of the Court below was based upon its finding that CATV systems are engaged in the business of receiving and retransmitting television signals to subscribers, that this business is unrelated to the business of producing and distributing original programs and that, therefore, CATV operators could not be required, as a condition of remaining in the CATV business, "to engage in the entirely new and different business of originating programs." (Pet. App. A, at 23-24).

The Court below was clearly correct. First, as previous decisions of this Court have recognized, CATV systems are engaged in the business of receiving and retransmitting programs originated by television broadcast stations. *Fortnightly Corp. v. United Artist Television, Inc.*, *supra*; *United States v. Southwestern Cable Co.*, *supra* at 163. The reception-retransmission activities of CATV systems are purely passive—the CATV operator erects an antenna, installs head-end equipment, captures signals which have been dedicated

to the public use by broadcast stations and distributes them to subscribers. In *Fortnightly*, this Court plainly spelled out the distinction which exists between the business engaged in by CATV operators and that engaged in by broadcasters as follows (392 U.S. 390, 399-401):¹⁸

... Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing,

¹⁸ Indeed this Court was careful to point out in its opinion (392 U.S. at 392, fn. 6) that even for copyright purposes a CATV system which originates programming is not necessarily the same type of business activity as a CATV system which restricts its role to reception and distribution of broadcast signals.

whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.

The Court below correctly recognized the fundamental distinction between the business of operating a CATV system and the business of originating programs and elaborated upon this distinction as follows (Pet. App. A, at 24):

Entering into the program origination field involves various substantial expenditures. Costly equipment must be purchased. Personnel must be employed who are skilled in photography, sound production, program planning and direction, and in performing. Such expenses will often prove burdensome because of the limited area the program will reach. See Federal Regulation of Cable Television; *The Visable Hand*, Chazen & Ross, 83 Harvard L. Rev. 1820.

The Commission has itself recognized that the operation of a cablecasting system requires investment in facilities and personnel not normally associated with the operation of a CATV system. This recognition is implicit in the estimates of the costs involved in converting a CATV reception-distribution system to a cablecasting system which are set forth in the *First Report and Order* (Pet. App. C, at 40-41). These estimates indicated that the cost would range from \$27,300 for a basic black and white system to \$95,000 for a full color system and that annual operating costs would range from \$14,300 for black and white system

to \$33,000 for color operations.¹⁹ A review of the various factors involved in these costs estimates leaves no doubt that cablecasting is not merely an adjunct of CATV operations but is, as the Court below found, an entirely different business activity requiring different equipment, materials and personnel.

Second, in view of the fact that CATV operators and cablecasting operations are wholly different businesses, the Court below correctly ruled that the Commission was without authority to condition the right of persons to engage in CATV operations upon their becoming program originators. This holding did not depend upon a resolution of the question of the extent of the Commission's authority to adopt reasonable regulations concerning any other aspects of the operations of CATV systems. A long line of decisions of this Court relating to the limits of the power of the Government to regulate the conduct of businesses affected with a public interest clearly establishes that the Commission cannot condition the right of CATV operators to engage in CATV reception activities on their relinquishing rights to which they are lawfully entitled or undertaking other activities for the benefit of the public *Interstate Commerce Commission v. Oregon-Washington R.R. & Nav. Co.* 288 U.S. 14 (1933); *Delaware, Lackawanna & Western R. Co. v. Morristown*, 276 U.S. 182 (1928); *Frost & Frost Trucking Co. v. Railroad*

¹⁹ In a *Memorandum Opinion and Order in Docket No. 18397*, 27 FCC 2d 778 (1971) (Pet. App. E, at 66) issued in response to Midwest's petition for a stay of the mandatory origination rules pending action by the Court below, the Commission acknowledged that the actual costs of converting to and operating an origination system may be substantially higher than the estimates contained in the *First Report and Order*.

Commission, 271 U.S. 583 (1926); *Northern Pacific R.R. Co. v. North Dakota ex rel. McCue*, 236 U.S. 585 (1915).²⁰

Frost & Frost and *Northern Pacific* are directly in point. *Frost & Frost* dealt with the validity of a California statute which provided that persons engaged in the transportation of persons or goods over California highways could continue to operate on the roads of California only upon becoming common carriers. Mr. Frost, who was engaged in the business of private contract carriage and who used the roads of California for that purpose, challenged the constitutionality of the statute. The California Supreme Court held that the state did not have the authority to compel Frost to

²⁰ These are only a few of the decisions of this Court stretching over a period of nearly a century which recognize the constitutional limits of the power of government to impose conditions upon the conduct of businesses or to limit the exercise of personal rights. Other cases in which the principle involved in these cases has been recognized are: *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570 (1925); *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922); *Western Union Telegraph Co. v. Foster*, 247 U.S. 105 (1918); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); *Cf. Jones v. State Board of Education*, 397 U.S. 31, 34 (1970) (dissenting opinion of Justice Douglas); *Thorpe v. Housing Authority*, 386 U.S. 670, 679 (1967) (concurring opinion of Justice Douglas); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Nebbia v. New York*, 291 U.S. 502 (1934); *Munn v. Illinois*, 94 U.S. 113 (1877).

The constitutional limits of governmental regulatory authority established by the foregoing cases have also been recognized and applied by State courts and Federal administrative agencies. See e.g., *Town of Beloit v. Public Service Commission*, 34 Wis. 2d 145, 148 N.W. 2d 661 (1967); *Utah Power & Light Co. v. Public Service Commission*, 122 Utah 284, 249 P.2d 951 (1952); *Georgia Power Co. v. Georgia Public Service Commission*, 211 Ga. 223, 85 S.E. 2d 14 (1954); *Hollywood Chamber of Commerce v. Railroad Commission*, 192 Cal. 307, 219 P. 983 (1923); *Panagra Terminal Investigation*, 4 CAB 670 (1944).

convert his business from that of a private carrier to a public carrier. It did hold, however, that the state had the power to grant or altogether withhold from its citizens the privilege of using its public highways for the purpose of transacting private business thereon and that since the legislature could entirely withhold the right of using the public highways for private business, it could grant that right on such conditions as it saw fit to impose. Accordingly, the California court held that it was appropriate to condition the special privilege which Frost enjoyed of using the public highways for his private business on Frost's dedicating his property to the quasi public use of public transportation; that Frost was not obliged to submit himself to the condition, but if he did not, he would lose the privilege of using the highway.

This Court disagreed, holding the state action to be unconstitutional. The Court pointed out that the statute in question did not in any way constitute a regulation of the use of public highways in that it was not in any way designed to protect or conserve the highways. As the Court stated (271 U.S. at 593):

There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guarantees, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though,

in form voluntary, in fact lacks none of the elements of compulsion. Having regard to the form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden:

Northern Pacific involved the question of the power of the state of North Dakota to fix intrastate rates for the carriage of lignite coal at a rate which would be less than the carrier's costs of, which would provide the carrier with no substantial compensation in addition to its costs. The state had set low rates for the intrastate carriage of lignite coal in order to serve the public interest of the people of North Dakota by encouraging the development of the local lignite coal industry. The Supreme Court of North Dakota held that, as the rates which the railroads were allowed to charge for carriage of other commodities were sufficiently high to permit them to earn a substantial profit on their overall operations in the state, the state had the power to fix the intrastate rate for the carriage of lignite coal at a rate which was less than compensatory to the carriers. This Court reversed, holding that the action of the State of North Dakota was unconstitutional as being equivalent "to an appropriation of property to public uses upon terms to which the carrier had in no way agreed." (236 U.S. at 598). In reaching this result, the Court summarized the principles to be applied in deciding the constitutionality of the state's action as follows (236 U.S. at 595):

The railroad property is private property devoted to a public use. As a corporation, the owner is

subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the state, within the limits of its jurisdiction, may enforce them. . . .

But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement.

The principles enunciated by this Court in *Frost & Frost* and *Northern Pacific* are dispositive of this case. To the extent that CATV operators have dedicated their property to a public purpose and are subject to the regulatory authority either of the Commission or state or local regulatory agencies, they may be regu-

lated in the public interest to insure that they adequately discharge the obligations to the public inherent in the nature of their business. They may not, however, be required to devote their property to other public purposes, nor may restrictions be imposed upon their operations which are not reasonably concerned with the conduct of the reception-distribution function they have undertaken to perform. The mandatory origination rule clearly has no bearing upon the adequacy with which CATV systems are performing this function. Nor does the rule involve the reasonableness of the terms on which CATV systems will make their service available to the public. The Commission, in fact, has never attempted to demonstrate that the rule in any way concerns the quality of service that the public is receiving from CATV systems or the reasonableness of the terms on which the service is made available. Rather, the Commission, in the belief that the public interest would be served by the establishment of additional outlets for local self expression, leaps to the conclusion that CATV systems with a minimum number of subscribers should be required to provide these outlets. The authorities cited above clearly establish that regardless of how great a public need there may be for additional outlets of local self expression, the Commission is without authority to single out CATV operators and require that they devote their property to the satisfaction of this public need.

The consequences of approving the Commission's theory of regulation would be staggering. If the Commission can legally condition the right of a CATV system to remain in business upon its undertaking to originate programs, what is there to stop it from requiring a CATV system—or a broadcast station—to

publish a daily newspaper in its community? ²¹ Surely the public need served by a newspaper is at least as important as a broadcast station. And there are many more communities which lack a newspaper than a radio station. If the analogy is deemed to be too far fetched—since publication of newspapers is not within the Commission's jurisdiction—the illustration can be brought directly within the Commission's ambit by inquiring as to whether the Commission could order FM stations, as a condition to their right to survive, to transmit newspaper by facsimile.²² What the Commission is attempting to accomplish by its order is tantamount to a government ukase to a company like General Motors that its right to continue in the business of manufacturing cars and trucks could be terminated unless it agreed to enter the business of manufacturing helicopters. Or the same argument could justify a

²¹ The business of operating a CATV system is closely analogous to the business of operating a newspaper distributorship and the requirement that CATV systems originate programs as a condition of remaining in business may properly be analogized to a requirement that newspaper distributors, as a condition of remaining in business, publish and distribute to their subscribers a local news supplement. Since there are presently only three daily newspapers of general circulation published in Washington, D.C., it would not be unreasonable for the government of that city to conclude that the public interest would be served by the establishment of additional newspapers devoted to local news, events and advertising. Can there be any doubt, however, that the Government of the city would be exceeding the limits of its authority if it were to require that all persons engaged in the business of distributing out-of-town newspapers to subscribers in the City of Washington must, as a condition of remaining in such business, publish and distribute to their subscribers a daily local news supplement in order to satisfy this public need?

²² See § 73.266 of the Commission's Rules and Regulations, 47 C.F.R. § 73.266, *permitting* but *not* requiring FM stations to transmit facsimile.

municipality which has granted appropriate licenses for a corner grocery store to require it to open a dry goods store as a condition of its right to continue to hold a license. Even in wartime, Government powers have not been extended to this extent.

CONCLUSION

For the foregoing reasons it is urged that the judgment of the Court below should be affirmed.

WAYNE W. OWEN
Union Life Building
Little Rock, Arkansas 72201

HARRY M. PLOTKIN
GEORGE H. SHAPIRO
DAVID TILLOTSON
1815 H Street, N.W.
Washington, D. C. 20006

Attorneys for Respondent

Of Counsel:

MOSES, McCLELLAN, ARNOLD,
OWEN & McDERMOTT
Union Life Building
Little Rock, Arkansas 72201

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

April 1972

ARY
SUPREME COURT, U. S.

FILED

APR 5 1972

MICHAEL D. LEE, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-506

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

MIDWEST VIDEO CORPORATION,

Respondent.

On Writ of Certiorari To
The United States Court of Appeals
For The Eighth Circuit

**BRIEF FOR THE
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS AS AMICUS CURIAE**

PAUL RODGERS
*General Counsel for the
National Association of Regulatory
Utility Commissioners*

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 628-7324
April 4, 1972

INDEX

	<u>Page</u>
OPINIONS BELOW	1
QUESTION PRESENTED	2
THE INTEREST OF THE NARUC AS <i>AMICUS CURIAE</i>	2
ARGUMENT	4
I. The FCC's mandatory origination rule is beyond the scope of the Communications Act, violates the freedom of speech guaranteed by the Fifth Amendment and the due process guaranteed by the Fifth Amendment to the Constitution; and conflicts with national antitrust policy	4
A. The FCC's Rule Exceeds statutory authority	4
B. The FCC's Rule violates the due process guaranteed by the Fifth Amendment	6
C. The FCC's Rule violates the freedom of speech guaranteed by the First Amendment	7
D. The FCC's Rule conflicts with national antitrust policy	10
II. State regulation of the local aspects of CATV operations is essential to the pro- tection of the consumer interest	12
CONCLUSION	20

CITATIONS

	<u>Page</u>
Cases:	
<i>Abrams v. United States</i> , 250 U.S. 616 (1919)	8
<i>Associated Press v. United States</i> , 326 U.S. 1 (1945)	8
<i>Burstyn v. Wilson</i> , 343 U.S. 495 (1952)	9
<i>California v. Thompson</i> , 313 U.S. 109 (1941)	13
<i>Carnation Company v. Pacific Westbound Conference</i> , 383 U.S. 213 (1966)	10
<i>Cohen v. California</i> , ___ U.S. ___, 29 L. Ed. 2d 284 (1971)	8
<i>FCC v. Allentown Broadcasting Corp.</i> , 349 U.S. 358 (1955)	8
<i>FCC v. Sanders Bros. Radio Station</i> , 309 U.S. 470 (1940)	8
<i>Fortnightly Corporation v. United Artists Television</i> , 392 U.S. 390 (1968)	4
<i>Frost v. Railroad Commission of the State of California</i> , 271 U.S. 583 (1926)	7
<i>Garrison v. Louisiana</i> , 379 U.S. 64 (1964).	8
<i>Head v. New Mexico Board of Examiners in Optometry</i> , 374 U.S. 424 (1963)	13
<i>Interstate Commerce Commission v.</i> <i>Oregon-Washington Railroad & Navigation Company</i> , 288 U.S. 14 (1933)	7

	<u>Page</u>
<i>International Salt Co. v. United States</i> , 332 U.S. 392	11
<i>Klor's v. Broadway-Hale Stores</i> , 359 U.S. 207 (1959)	11
<i>Mansfield Journal Co. v. FCC</i> , 180 F.2d 28 (1950)	10
<i>Martin v. City of Struthers</i> , 319 U.S. 141 (1943)	9
<i>Metropolitan Television Company v. FCC</i> , 289 F.2d 874 (1961)	10
<i>National Broadcasting Company v. United States</i> , 319 U.S. 190 (1943)	10
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931)	9
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	8
<i>New York Times Co. v. United States</i> , ____ U.S. ____, 29 L. Ed. 2d 822 (1971)	9
<i>Northern Pacific Railway Company v. United States</i> , 356 U.S. 1 (1958)	10
<i>Philco Corporation v. FCC</i> , 293 F.2d 864 (1961)	10
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969)	7
<i>TV Pix, Inc. v. Taylor</i> , 304 F. Supp. 459, aff'd 396 U.S. 556 (1970)	3, 15, 16
<i>United States v. Radio Corporation of America</i> , 358 U.S. 334 (1959)	10

United States v. Southwestern Cable Company,
392 U.S. 157 (1968) 6, 16

Whitney v. California,
274 U.S. 357 (1927) 9

Statutes:

Alaska Statutes, Title 42,
Chapter 05, Sec. 761 2

Communications Act of 1934, as amended
(47 U.S.C., Sec. 151 *et seq.*) 2, 13

Connecticut General Statutes,
Chapter 289, Secs. 16-330 through 16-333. 2

Federal Power Act
(16 U.S.C., Sec. 791, *et seq.*) 12

Federal Railroad Safety Act of 1970 12

Hawaii Revised Statutes,
Chapter 269 2

Illinois Revised Statutes,
Chapter 111-2/3, Sec. 10-3(b) 2

Interstate Commerce Act
(49 U.S.C., Sec. 1, *et seq.*) 12

Massachusetts General Laws,
Chapter 116A 2

Natural Gas Act
(15 U.S.C., Sec. 717, *et seq.*) 12

Natural Gas Pipeline Safety Act of 1968 12

	<u>Page</u>
Nevada Revised Statutes, Sec. 711.010 <i>et seq.</i>	2, 15
Rhode Island General Laws, Secs. 39-19-1 through 39-19-8	2
Sherman Antitrust Act (15 U.S.C., Sec. 1)	10
Vermont Statutes Annotated, Title 30, Chapter 13	3
 Miscellaneous:	
Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv L. Rev. 1 (1965)	8
Broadcasting Magazine, 1971 CATV Directory	17
2 Z. Chafee, Government and Mass Communications 546 (1947).	8
Federal Regulation of Cable Television: The Visible Hand, Chazen and Ross, 83 Harvard L. Rev. 1820.	6
16 CJS, Constitutional Law, Sec. 213(17), p. 1137	9
Opinion of the Attorney General of Hawaii, No. 69-29, Dec. 2, 1969, CCH Utilities Law Reporter, Sec. 21,206	2
77th NARUC Annual Convention Proceedings, p. 555 (1965).	15
NARUC Bulletin No. 13-1966, pp. 2-12.	15
No. 6-1971, p. 9.	18

IN THE
Supreme Court of the United States

October Term, 1971

No. 71-506

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

MIDWEST VIDEO CORPORATION,
Respondent.

On Writ of Certiorari To
The United States Court of Appeals
For The Eighth Circuit

**BRIEF FOR THE
NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS AS *AMICUS CURIAE***

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 441 F.2d 1322. The orders of the Federal Communications Commission are reported at 20 FCC 2d 201, 23 FCC 2d 825, and 27 FCC 2d 778.

QUESTION PRESENTED

Whether the rule of the Federal Communications Commission requiring community antenna television systems with 3,500 or more subscribers to originate programming is authorized by the Communications Act of 1934, as amended (47 U.S.C., Sec. 151 *et seq.*).

THE INTEREST OF THE NARUC AS *AMICUS CURIAE*

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States engaged in the regulation of carriers and utilities. The mission of the NARUC is to improve the quality and effectiveness of public regulation in America. More specifically, the NARUC contains the State officials charged with the duty of regulating communications within their respective States and, as such, they have the obligation to assure the establishment and maintenance of such communication service and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates that are just and reasonable.

The States of Alaska¹, Connecticut², Hawaii³, Illinois⁴, Massachusetts⁵, Nevada⁶, Rhode Island⁷ and

¹ Alaska Statutes, Title 42, Chapter 05, Sec. 761.

² Connecticut General Statutes, Chapter 289, Secs. 16-330 through 16-333.

³ Hawaii Revised Statutes, Chapter 269. See also Opinion of the Attorney General of Hawaii, No. 69-29, Dec. 2, 1969, CCH Utilities Law Reporter, Sec. 21, 206.

⁴ Illinois Revised Statutes, Chapter 111-2/3, Sec. 10-3(b).

⁵ Massachusetts General Laws, Chapter 116A.

⁶ Nevada Revised Statutes, Sec. 711.010 *et seq.*

⁷ Rhode Island General Laws, Secs. 39-19-1 through 39-19-8.

Vermont⁸ have asserted the authority to regulate the local aspects of community antenna television (CATV) systems. This State action reflects a strong national trend at the State level to protect the consumer interest by certificating qualified applicants to provide CATV service, and regulating rates to CATV subscribers and quality of service. Such a State role has been expressly upheld by this Court in *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459, aff'd 396 U.S. 556, 24 L. Ed. 2d 746, 90 S.Ct. 49 (1970).

The rule of the Federal Communications Commission (FCC) requiring CATV systems with 3,500 or more subscribers to originate programming conflicts with State and local governmental efforts to regulate these systems as common carriers. At the very least, the FCC's mandatory origination requirement preempts critical CATV system capacity which would otherwise be available for public use.

Accordingly, the decision by the Court of the issues in this case will be of paramount regulatory importance and will have a substantial affect on the ability of State agencies to protect the public interest in proceedings involving CATV service. Therefore, the members of the NARUC, as government regulators, are vitally concerned with these issues and the precedents which will be established by their resolution.

⁸ Vermont Statutes Annotated, Title 30, Chapter 13.

ARGUMENT

- I. THE FCC'S MANDATORY ORIGINATION RULE IS BEYOND THE SCOPE OF THE COMMUNICATIONS ACT, VIOLATES THE FREEDOM OF SPEECH GUARANTEED BY THE FIRST AMENDMENT AND THE DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION, AND CONFLICTS WITH NATIONAL ANTITRUST POLICY.

This case arises from an order of the FCC adopting a rule requiring CATV systems with more than 3,500 subscribers, as a condition for the carriage of television broadcast signals, to originate programming. The Court of Appeals held that the FCC lacks statutory authority to require program origination.

A. The FCC's Rule Exceeds Statutory Authority.

The FCC, by this rule, seeks to engineer a profound change in the nature of CATV service by transforming the larger CATV systems from mere transmitters of programming to originators of it.

This Court in *Fortnightly Corporation v. United Artists Television*, 392 U.S. 390, 20 L. Ed. 2d 1176, 88 S.Ct. 2084 (1968), clearly articulated the difference between broadcasters, who originate programming, and CATV systems, who do not. The Court, in absolving CATV systems from copyright liability, held that:

... Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no

more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry. 392 U.S. 398, 20 L. Ed. 2d. 1182.

Accordingly, the FCC's mandatory origination rule far exceeds the "ancillary" test prescribed by this Court in *United States v. Southwestern Cable Company*, 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S.Ct. 1994 (1968). The Court, in upholding the FCC's authority to arrest the expansion of CATV systems to protect broadcasters, carefully restricted the FCC's jurisdiction over CATV "to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." This Court expressed "no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." 392 U.S. 178, 20 L. Ed. 2d 1016(15).

B. The FCC's Rule Violates the Due Process Guaranteed by the Fifth Amendment.

As indicated above, the FCC's mandatory origination rule seeks to change the basic nature of the service offered by CATV systems, and to do so at substantial cost to system operators.

The Court below observed, and the United States does not deny, that the:

... Petitioner is required as a condition to its right to use the captured signals in their existing franchise operation to engage in the entirely new and different business of originating programs. Entering into the program origination field involves very substantial expenditures. Costly equipment must be purchased. Personnel must be employed who are skilled in photography, sound production, program planning and direction, and in performing. Such expense will often prove burdensome because of the limited area the program will reach. See Federal Regulation of

Cable Television: The Visible Hand, Chazen and Ross, 83 Harvard L. Rev. 1820.

This Court in *Frost v. Railroad Commission of the State of California*, 271 U.S. 583, 70 L. Ed. 1101 (1926), invalidated a similar attempted transfiguration by holding that a private carrier is unconstitutionally deprived of his property without due process of law by the State requiring him to become a public carrier in order to secure a permit to use the public highways for transportation purposes. See also *Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Company*, 288 U.S. 14, 77 L. Ed. 588 (1933).

The *Frost* analogy precludes the FCC from here conditioning the right of persons to continue operating CATV systems by forcing them to assume the burden of program origination.

C. The FCC's Rule Violates the Freedom of Speech Guaranteed by the First Amendment.

The First Amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . .".

The FCC's mandatory origination rule preempts critical CATV system capacity which would otherwise be available for public use and, hence, a medium for public expression is unconstitutionally narrowed under the guarantees of the First Amendment.

This Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 23 L. Ed. 2d 371, 389 (24), 89 S.Ct. 1794 (1969), described the First Amendment impact on broadcasting in the following terms:-

. . . It is the right of the viewers and listeners, not the right of the broadcasters, which is

paramount. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 84 L. Ed. 869, 874, 60 S.Ct. 693 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362, 99 L. Ed. 1147, 1152, 1153, 75 S.Ct. 855 (1955); 2 Z. Chafee, *Government and Mass Communications* 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 20, 89 L. Ed. 2013, 2030, 65 S.Ct. 1416 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 11 L. Ed. 2d 686, 700, 84 S.Ct. 710, 95 ALR2d 1412 (1964); *Abrams v. United States*, 250 U.S. 616, 630, 63 L. Ed. 1173, 1180, 40 S.Ct. 17 (1919) (Holmes, J., dissenting). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 13 L. Ed. 2d 125, 133, 85 S.Ct. 209 (1964). See Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

This Court in construing a First Amendment issue in *Cohen v. California*, ___ U.S. ___, 29 L. Ed. 2d 284, 91 S.Ct. ___ (1971), observed that:

... The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See *Whitney v. California*, 274 U.S. 357, 375-377, 71 L. Ed. 1095, 1105, 1106, 47 S.Ct. 641 (1927) (concurring opinion of Brandeis, J.). 29 L. Ed. 2d 293.

The freedom to distribute information is clearly vital to the preservation of a free society. *Martin v. City of Struthers*, 319 U.S. 141, 146, 87 L. Ed. 1313, 1319 (1943). Moreover, the FCC's mandatory origination requirement, which limits public access to CATV system facilities, is in the nature of a prior restraint which infringes the First Amendment. Compare: *New York Times Co. v. United States*, ___ U.S. ___, 29 L. Ed. 2d 822, 91 S.Ct. ___ (1971); *Burstyn v. Wilson*, 343 U.S. 495, 503, 96 L. Ed. 1098, 1107(5), 72 S.Ct. 777 (1952); and *Near v. Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S.Ct. 625 (1931).

The FCC's mandatory origination rule also infringes upon the CATV operator's First Amendment right to remain silent, i.e. not to originate programming. 16 *CJS*, Constitutional Law, Sec. 213(17), p. 1137.

D. The FCC's Rule Conflicts with National Antitrust Policy.

The Sherman Antitrust Act declares that "Every contract, combination in the form of trust or otherwise, or conspiracy, *in restraint of trade or commerce* among the several States . . . is declared to be illegal . . .". 15 U.S.C., Sec. 1. Emphasis supplied.

The FCC is under a duty to administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. *National Broadcasting Company v. United States*, 319 U.S. 190, 222, 87 L. Ed. 1344, 1366, 63 S.Ct. 997 (1943). See also: *Carnation Company v. Pacific Westbound Conference*, 383 U.S. 213, 217, 15 L. Ed. 2d 709, 713(5), 86 S.Ct. 781 (1966); *United States v. Radio Corporation of America*, 358 U.S. 334, 351, 3 L. Ed. 2d 354, 366(11), 79 S.Ct. 457 (1959); *Philco Corporation v. FCC*, 293 F.2d 864 (1961); *Metropolitan Television Company v. FCC*, 289 F.2d 874, 876(3) (1961); and *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (5-6) (1950).

Since the FCC's mandatory origination rule preempts critical CATV system capacity, which would otherwise be available for public use, the rule is in conflict with national antitrust policy which prohibits the restraint of trade or commerce. In other words, the FCC's rule restrains the competitive use of CATV system capacity and, further, provides the CATV operator with an economic incentive to favor his programming over that offered by potential competitors seeking to use the remaining capacity of his system.

This Court in *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 4, 2 L. Ed. 2d 545, 549(1), 78 S.Ct. 514 (1958), described the broad reach of anti-trust policy as follows:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States."

The Court observed in *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 213, 3 L. Ed. 2d 741, 745(4), 79 S.Ct. 705 (1959), that:

. . . the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one" or "one that proceeds at full gallop." *International Salt Co. v. United States*, 332 U.S. 392, 396, 92 L. Ed. 2d 20, 26, 68 S.Ct. 12.

Accordingly, the FCC's rule is unreasonable because it seeks to restrain competition by requiring a CATV operator to increase his use of the system's capacity which, in turn, limits access by the public.

II. STATE REGULATION OF THE LOCAL ASPECTS OF CATV OPERATIONS IS ESSENTIAL TO THE PROTECTION OF THE CONSUMER INTEREST.

The Court in deciding the issues in this case should be careful to preserve the role of the States in regulating the local aspects of CATV operations for the protection of consumer interests.

The Congressional propensity to divide the interstate and intrastate characteristics of a national industry, and to assign the former to Federal regulation and to reserve the latter for State regulation, is consistently reflected in many other areas. More specifically, this regulatory dichotomy is applied to electric companies under the Federal Power Act,⁹ to gas companies under the Natural Gas Act,¹⁰ to railroads and motor carriers under the Interstate Commerce Act,¹¹ and to telephone and telegraph companies

⁹ 16 U.S.C., Sec. 791, *et seq.*, with particular reference to Secs. 824(b)(c), 824a(f), 824c(f), and 824h. In general, the Federal Power Commission regulates wholesale rates and related facilities and service, and the State commissions regulate retail rates and related facilities and service.

¹⁰ 15 U.S.C., Sec. 717, *et seq.*, with particular reference to Secs. 717(b)(c), 717a(6, 7), and 717p. In general, the Federal Power Commission regulates "interstate" wholesale rates and related facilities and service, and the State commissions regulate "intrastate" wholesale and all retail rates and related facilities and service. See also Secs. 3, 4 and 5 of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C.A., Sec. 1672-1674) which apply an analogous regulatory split to the national gas safety program.

¹¹ 49 U.S.C., Sec. 1, *et seq.*, with particular reference to Secs. 1(2), 1(17)(a), 1(22), 13(2)(3), 13a(2), 302(a)(b), 303(10)(20), and 305. In general, the State commissions regulate the intrastate business of railroads and motor carriers. See also Secs. 205 and 206 of the Federal Railroad Safety Act of 1970 (Public Law 91-458) which permits a State to adopt more stringent safety regulations than the Federal safety regulations "when necessary to eliminate or reduce an essentially local safety hazard"

(continued)

under the Communications Act.¹² See also: *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 10 L. Ed. 2d 983, 83 S.Ct. 1759 (1963); and *California v. Thompson*, 313 U.S. 109, 85 L. Ed. 1219 (1941).

The CATV business possesses all the attributes of a natural monopoly. The supply characteristics of CATV service are quite similar to those of local electric, gas and telephone companies — the traditional public utilities.

The CATV business depends upon a distribution system within the public ways which can only be constructed at substantial cost. The basic distribution system, once constructed, can provide service to additional customers within the area at an extremely low increment of cost. Where the distribution system is owned and controlled by the CATV operator, competition can only arise by a complete duplication of the distribution system already in place and this is practically an insurmountable economical barrier. Moreover, if two competitors construct two distribution systems and begin operation, the service available to the public must carry a double investment and yet there is little opportunity of obtaining improvement in service because of competition. Essentially, both CATV operators would be providing substantially the same television signal product.

There is a well defined public need for CATV service.

¹¹ (continued) created by interstate railroad operations; and to otherwise conduct a comprehensive safety program covering substantially all interstate railroad operations within the State.

¹² 47 U.S.C., Sec. 151, *et seq.*, with particular reference to Secs. 152, 153(e)(h), 214(a)(1-3), 221(b) and 410. The Federal Communications Commission regulates interstate message toll calls, and the State commissions regulate intrastate message toll calls and local exchange calls even in instances where the boundaries of the exchange area overlap State lines.

Television is one of the nation's prime information and entertainment resources. Among viewers, television is often found to be addictive. Undoubtedly, many families could tolerate degraded telephone service more easily than they could tolerate poor or limited television reception.

For example, novelist James A. Michener in a recent article entitled "One and a Half Cheers for Progress" which appeared in the *New York Times Magazine* observed that:

CATV has already given premonitions of the revolution that will be underway when 17 to 75 static-free channels can be piped into every home for a small monthly fee. Researchers have found that in those experimental areas where CATV is now allowed to operate, with only a few channels, families produce the monthly rental even if it means not paying the doctor, the dentist or the grocer. These viewers would rather have clear television reception than health or food.

CATV, of course, enhances our vital television resource by providing improved signal quality, which is particularly important for color transmissions, and by providing a greater variety of programming than would otherwise be afforded by off-the-air reception. CATV typically has achieved a penetration of almost 50% of the homes in the areas served.

The NARUC in recent years has actively encouraged State regulation of the local aspects of CATV operations.

The members of the NARUC, assembled in their Seventy-seventh Annual Convention in New York City on October 2, 1965, unanimously adopted a resolution directing the preparation of a model statute providing for State regulation of

CATV systems as public utilities. *77th NARUC Annual Convention Proceedings*, p. 555 (1965).

The resolution recognized the rapid growth of CATV systems, that they are "endowed with the monopolistic characteristics of public utilities," and that State regulation thereof "is in the public interest because it would protect viewers from exorbitant charges and degraded service."

After consultation with staff members of the Federal Communications Commission and other interested parties, the Model State Community Antenna Television System Act, draft of February 18, 1966, was distributed to the State commissions. *NARUC Bulletin No. 13-1966*, pp. 2-12.

Thereafter, the State of Nevada enacted a statute, patterned largely after the NARUC Model Act, which empowered the Nevada Public Service Commission to regulate CATV systems as public utilities. Nevada Revised Statutes, Sec. 711.010, *et seq.*

A three-judge Federal district court in Nevada on December 2, 1968, upheld the validity of this statute against challenges that it imposed an unconstitutional burden on interstate commerce; that Congress had preempted the field of television communications; and that the statute deprived the plaintiff of its property without due process of law. *TV Pix, Inc. v. Taylor, et al.*, 304 F. Supp. 459.

The court observed that:

"We do not view the subjects of regulation contemplated by the Nevada statute, *i.e.*, the quality of and the rates and charges for community antenna service, as being of the character demanding national uniformity so that state action is entirely inadmissible. On the contrary, these are subjects which lend themselves naturally

to local control and supervision. National uniformity is probably not a possibility, let alone an acceptable ideal."

This Court on February 2, 1970, summarily affirmed the decision of the three-judge court thereby dispelling any doubt as to the authority of State and local governments to regulate the local aspects of CATV operations. 396 U.S. 556, 24 L. Ed. 2d 746, 90 S.Ct. 49.

This judicial viewpoint expressed above is sound both legally and realistically. Knowledge concerning the legal, technical, financial and character qualifications of the franchise applicant is uniquely within the province of State and local authorities. Similarly, these authorities are best able to determine whether the granting of a franchise is required by the public interest.

Service standards and rate structures necessarily must vary from State to State and even within a single State. Accordingly, State rather than Federal agencies are best equipped to determine the justness and reasonableness of proposed rates and to discern the individual and often unique requirements of differing localities with respect to safe and adequate service and facilities.

The fact that only eight States (*supra*, footnotes 1-8) now regulate the local aspects of CATV at the State level simply means that these aspects are now being regulated at the local level in the remaining States where CATV operations exist.¹³ Undoubtedly, as CATV continues to grow there will be an increasing shift of regulatory authority from the local to State levels. This evolutionary process occurred in the regulation of electric, gas and telephone utilities and will occur as to CATV — if permitted.

¹³ The Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L.Ed. 2d 1001, 88 S.Ct. 1994 (1968), at footnote 15, stated that "some 86% of the (CATV) systems are subject at least to some local regulation."

While the development of State regulation of CATV operations has thus far been slow, the NARUC believes that there will be an acceleration of State regulatory activity in the near future due to the rapid and widespread growth of the CATV industry.

The demand matrix for CATV service is enormous.

Broadcasting Magazine, in its 1971 CATV Directory, reports that over 30.5 million Americans live in communities that are served by CATV systems. It estimates that over 4.5 million homes subscribe to CATV service from 28 hundred systems serving nearly 45 hundred communities.

During the 1970's, the number of CATV households is expected to increase from 4.5 million or 7.6% of the nearly 60 million television households in the United States at year-end 1969 to 26.3 million or 36% of the 72.5 million TV households at year-end 1980, reflecting an average annual growth of 18%.

The revenues from CATV system operations are expected to increase from approximately \$213 million in 1968 to over \$3.4 billion by 1980, reflecting an average annual growth rate of 26% over the 12-year period.

Although installation fees for CATV service have been discontinued in some cases, most systems still levy a charge of 10 to 25 dollars. There are 30 cable systems, however, that impose installation fees of 50 dollars and up; and one charges 162 dollars and 50 cents.

Monthly fees for CATV service generally are in the 5 to 6 dollar range, although a substantial number of cable systems are now charging 7 to 8 dollars monthly. A few go as high as 9 to 10 dollars a month.

Moreover, an editorial in the Cable News of December 18, 1970, stated that nearly 1,000 CATV systems in the Nation are obsolete and antiquated and should be rebuilt.

It further stated that too many cable operators are not delivering picture quality and in many cases the picture is not acceptable. Comments were directed to those localities where the viewer did not have a choice between over-the-air television and CATV and it emphasized the importance that those cable operators rebuild and improve their systems for delivery of clear acceptable signals or they will get the regulation they are trying to avoid. The Editor chided them for taking money out of these communities for years and putting nothing back in by keeping modern, up-to-date equipment in operation. *NARUC Bulletin No. 6-1971, p. 9.*

The socioeconomic environment in the United States during the 1970's will be favorable to the growth of CATV. Gross national product and personal income will increase significantly during the decade. This increase coupled with an increase in leisure time and educational level of the population, will provide more time, money, and interest in educational and recreational activities. Both of these interests will be partially met through the programming diversity provided by CATV. Moreover, the number of color television sets and multiple television set households will increase significantly during the period, and the householder's expenditure for both color and multiple sets can be greatly optimized through the use of CATV.

During the 1970's, there is likely to be an even greater awareness of the interests and needs of special interest groups, including preschool education, adult education, job training, special religious activities, and medical training for the layman. CATV has the capacity to accommodate these social needs.

In summary, the socioeconomic environment is extremely favorable to the development of CATV during the 1970's. Not only will people have the time and money, but their

interests will become more segmented thus encouraging the greater development of this medium. Furthermore, the demographic trend toward higher incomes, more education, and younger families will have a favorable influence on the potential growth of CATV.

These projections reflect the inexorable march of the CATV industry into a new and growing dimension of public concern.

The involvement of an ever-growing number of consumers with CATV service will inevitably lead to consumer demand for government protection against unreasonable rates and degraded service. Accordingly, such a demand will provide the necessary catalyst for State legislatures to enact appropriate legislation to safeguard the public interest in these matters of local concern.

Therefore, the continued encouragement of State and local regulation is decidedly in the public interest because it keeps government close to the governed and thereby stimulates the prompt and responsive protection of consumer interests by State and local officials.

This approach would utilize the States in their well recognized role of "testing laboratories" of the governmental process, whereby innovation and experiment may be undertaken and later retained or rejected as results dictate. The public interest requires the stimulation of these productive resources.

The FCC is too remote and it does not have the funds or the personnel to adequately regulate the local aspects of CATV and to meet the tremendous consumer protection demand which they pose.

Accordingly, the Court in deciding the issues in this case should not impair the ability of the States to protect the consumer interest in this rapidly unfolding field.

CONCLUSION

For the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

PAUL RODGERS

*General Counsel for the
National Association of
Regulatory Utility Commissioners*

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044
(202) 628-7324

April 4, 1972

LIBRARY
SUPREME COURT, U.S.

RECEIVED
FILED

APR 13 1972

MICHAEL ROZAK JR. CLERK

No. 71-506

In the Supreme Court of the United States

OCTOBER TERM, 1971

**UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, PETITIONERS**

v.

MIDWEST VIDEO CORPORATION

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

REPLY BRIEF FOR THE PETITIONERS

KENNETH H. GREENWOLD,

*Solicitor General,
Department of Justice,
Washington, D.C. 20530.*

JOHN W. PETTIT,

*General Counsel,
Federal Communications Commission,
Washington, D.C. 20551.*

INDEX

CITATIONS

Cases:

<i>Fortnightly Corp. v. United Artists</i> , 392 U.S. 390	Page 6
<i>Frost Trucking Co. v. R. R. Commission</i> , 271 U.S. 583	4
<i>General Telephone Co. of Cal. v. Federal Communications Commission</i> , 413 F. 2d 390, certiorari denied, 396 U.S. 888	3
<i>Nothorn Pacific Railway v. North Dakota</i> , 236 U.S. 585	4
<i>Philadelphia Television Broadcasting Co. v. Federal Communications Commission</i> , 359 F. 2d 282	4
<i>Red Lion Broadcasting Co. v. Federal Communications Commission</i> , 395 U.S. 367	5
<i>United States v. Southwestern Cable Co.</i> , 392 U.S. 157	2, 5, 6

Statutes:

Communications Act of 1934, 48 Stat. 1064, as amended 47 U.S.C. 151, <i>et seq.</i> :	
Section 3(b), 47 U.S.C. 153(b)	3
Section 3(k), 47 U.S.C. 153(k)	3
Section 3(o), 47 U.S.C. 153(o)	3
Section 3(dd), 47 U.S.C. 153(dd)	3
Section 301, 47 U.S.C. 301	4
Section 303, 47 U.S.C. 303	5
Section 303(g), 47 U.S.C. 303(g)	4
Section 303(s), 47 U.S.C. 303(s)	5, 6
Section 307(a), 47 U.S.C. 307(a)	4

Statutes—Continued

Section 307(b), 47 U.S.C. 307(b)-----	5
Section 308, 47 U.S.C. 308-----	4
Section 309(a); 47 U.S.C. 309(a)-----	4
Copyright Act. of 1909, 35 Stat 1075, as amended, 17 U.S.C. 1, <i>et seq</i> -----	6

Miscellaneous:

31 F.C.C. 2d 115-----	8-9
37 Fed. Reg. 3252-----	1
37 Fed. Reg. 3269-----	7, 8
37 Fed. Reg. 3269-3272-----	5
37 Fed. Reg. 3271-3272-----	8
37 Fed. Reg. 3275, 3677-----	7
37 Fed. Reg. 3280-----	4
Rules re Microwave. Served CATV, 38 F.C.C. 683-----	5

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, PETITIONERS

v.

MIDWEST VIDEO CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The gist of respondent's position before this Court is that cable television¹ is an enterprise separate and apart from television broadcasting. From this premise respondent reaches the conclusion, as did the court

¹ Cable television was formerly called community antenna television (CATV) by the Commission. Because of the broader functions to be served by such systems in the future, the Commission in its Report and Order on *Cable Television Service* of February 12, 1972, 37 Fed. Reg. 3252, adopting a comprehensive set of rules to govern the future growth of the service, has utilized the more accurate term "cable television." Ten copies of the Report and Order have been lodged with the Clerk of this Court.

below, that while the Communications Act confers upon the Commission authority to regulate those cable activities which have a direct impact upon the service rendered to the public by television broadcast stations, it does not confer authority to require cable systems to engage in program origination against their will. The respondent urges, in addition, that the Commission's program origination rule would not be valid even if cable television were deemed to be broadcasting.

This position, in our view, fails to take adequate account of either the precise terms of the Communications Act of 1934 or cable television's relationship to broadcasting. As we pointed out in our opening brief, the Communications Act was designed by Congress to be a broad charter for the future in a field pervasively characterized by dynamism. Congress was more successful in that effort than respondent is prepared to recognize. This Court has already made clear that cable television systems are part of an "essentially uninterrupted and properly indivisible" stream of interstate communications. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169. The statute also makes clear that cable television systems, as they now operate, are engaged in communication by radio,²

² They are, of course, also engaged in communication by wire. See *United States v. Southwestern Cable Co.*, *supra*, 392 U.S. at 168 (indicating that cable systems are "within the [statutory] term 'communication by wire or radio'"). Since the rule at issue here applies only to cable systems which pick up and transmit broadcast programs, here as in *Southwestern Cable* the validity of the Commission's action does not depend on whether

since it is a radio signal that they pick up and forward, and since under the Act "Radio communication" means "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Section 3(b), 47 U.S.C. 153(b). Having "inserted themselves as links in this indivisible stream" and having "become an integral part of interstate broadcast * * * transmission," *General Telephone Co. of Cal. v. Federal Communications Commission*, 413 F. 2d 390, 401 (C.A.D.C.), certiorari denied, 396 U.S. 888, cable television systems have undertaken to act as broadcast instrumentalities. While it is unnecessary in the present case to decide whether they fall precisely within the Act's definition of a broadcast station,³ and we recognize that they differ in important respects from traditional broadcast stations, it is our submission that cable systems have assumed a role as instrumentalities of broadcasting that subjects them to reasonable regulation compatible with

cable systems are regarded as communication by wire, communication by radio, or both.

³ Section 3(k) of the Act, 47 U.S.C. 153(k), defines "Radio station" as "a station equipped to engage in radio communication or radio transmission of energy," and Section 3(o), 47 U.S.C. 153(o), states that "'Broadcasting' means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." A "broadcast station" is "a radio station equipped to engage in broadcasting * * *." 47 U.S.C. 153(dd).

that role—regulation which is not limited to their impact upon traditional broadcasting.⁴

This being so, the remaining issue is whether the Commission's modest requirement of some program origination by cable systems financially able to do so is reasonably related to the public's interest in "the larger and more effective use of radio in the public interest," 47 U.S.C. 303(g), and to the overall public interest standard of the Act applicable to all uses of radio, both broadcast and non-broadcast, 47 U.S.C. 301, 307(a), 308, 309(a).⁵ Respondent makes no sub-

⁴ Accordingly, the Commission's new rules, adopted in February 1972 (note 1, *supra*), require a form of quasi-license for cable television operations. Cable television systems may not commence operations or add a television broadcast signal to an existing system without obtaining from the Commission a certificate of compliance. Section 76.11, 37 Fed. Reg. 3280. Such a certificate is granted only upon a showing that the system is properly franchised by local authorities under certain standards set by the Commission, and that it will comply with the Commission's substantive requirements on such matters as provision of access channels and the limitations on carriage of non-local television broadcast station signals. The decision to regulate cable television only so far as is necessary for federal purposes comports with the leeway given the Commission by the Act to choose "which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective." *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 359 F.2d 282, 284 (C.A.D.C.).

⁵ The statutory context here, coupled with the close functional relationship between cablecasting and broadcasting, distinguishes cases such as *Frost Trucking Co. v. R. R. Commission*, 271 U.S. 583, and *Northern Pacific Railway v. North Dakota*, 236 U.S. 585, on which respondent relies. Those cases hold that the power to regulate one activity does not impart power to direct the institution of a different activity with respect to which no regulatory power has been conferred, and that the

stantial argument addressed to this issue, which is not surprising in view of the Commission's established emphasis in allocating television facilities under Sections 303 and 307(b), 47 U.S.C. 303, 307(b), upon the "desirability of having a large number of local outlets," First Report and Order, 38 F.C.C. 683, 699. See also *United States v. Southwestern Cable Co.*, *supra*, 392 U.S. at 174. To the extent that cable television systems provide an additional means of originating programming, including coverage of public affairs, they clearly enhance the use of radio in the public interest. *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367.*

conduct of a lawful activity may not be made conditional upon an unlawful or unconstitutional requirement. But no such unconstitutional requirement is imposed here, since, as we have shown in our opening brief, it would be unrealistic to treat program origination as unrelated to the role cable systems have assumed. Surely Congress is not constitutionally barred from requiring, in a reasonable manner, that cablecasters utilize the technical capacity that is theirs to overcome the limitations on program diversity which are inherent in the broadcast spectrum. Cf. 47 U.S.C. 303(s) (conferring authority on the Commission to require that all new television receivers be equipped to receive UHF as well as VHF broadcasts). And, we submit, in the provisions of the Communications Act to which we have referred, Congress has provided the Commission with sufficient authority and standards on which to base the rule at issue here.

*To further implement the objective of increasing program diversification, the Commission's new cable television rules adopted in February 1972 require certain cable systems to provide additional channels without charge, at least for an initial period, for noncommercial public access, educational use, and local government use. Available bandwidth is also required to be utilized for leased access by others. See 37 Fed. Reg. 3269-3272.

It is no answer to suggest (Resp. Br. 18) that even a broadcast station applicant could not be required to locate his station in a community other than the one in which he chooses to locate. No such requirement is involved here. The program origination rule requires only that a person undertaking to bring a broadcast service to the public do so in a manner that will provide a well-rounded service within the context of his undertaking.⁷ Nor does *Fortnightly Corp. v. United Artists*, 392 U.S. 390, hold to the contrary. That case was concerned not with the reach of the Commission's regulatory jurisdiction, but rather with the wholly different question of the meaning of the term "perform" in the Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U.S.C. 1 *et seq.* The systems involved there were held not to "perform" the programs they carried within the meaning of that Act, since they served as an arm of the viewer to enhance his capacity to receive the broadcaster's signal. While that decision thus distinguished between cable television and broadcast television for purposes of copyright infringement,⁸ it did not undercut the rationale of *Southwestern Cable* that for regulatory purposes cable

⁷ Although the question need not be decided here, there is no reason to assume that in proper circumstances the Commission could not similarly have required standard broadcast (AM) licensees to operate also on frequency modulation (FM) channels, at least temporarily, as a means of developing the FM service. Cf. 47 U.S.C. 303(s).

⁸ That case, however, did not involve distant television signals brought to the cable television system's community⁹ by microwave relays.

television is an integral part of the interstate flow of television broadcast service.⁹

⁹ If the Commission's program origination rule is, as we contend, a reasonable regulation of an interstate activity, the argument for exclusive state control advanced in the *amicus* brief of the State of Illinois of course fails. As we pointed out in our opening brief, the program origination requirement at issue here applies only to cable systems which pick up and transmit broadcast programs, and even with respect to such systems a substantial role has been reserved for state regulatory authority. See the Commission's February 1972 Report and Order, 37 Fed. Reg. at 3275-3277, explaining the dual-jurisdiction relationship of federal and state regulation adopted in the Commission's comprehensive new *Cable Television Service* rules. State regulation which conflicts with federal requirements must, of course, yield (but see n. 6, *supra*, indicating that the Commission's approach is not as completely opposed to that desired by Illinois as that State's *amicus* brief suggests). Moreover, the Commission has acted with cognizance of the particular need for unified federal regulatory authority in this field because of the potential for conflicting state regulation in the many metropolitan areas which cross state lines. Illinois itself, for example, shares some of its most prominent metropolitan areas with at least three other states: Indiana (Chicago-East Chicago-Hammond-Gary), Iowa (Davenport-Rock Island-Moline, also Dubuque-East Dubuque), and Missouri (St. Louis-East St. Louis).

The *amicus* argument of the American Civil Liberties Union that requiring, or even permitting, cable systems to originate programming will induce cable systems to limit their carrier capacity which would otherwise be expanded to meet the demands of others, presents no substantial issue. The *amicus* brief is based solely upon conjecture and takes no account of the further requirements which the Commission has now imposed to require that access be afforded to others, see footnote 6, *supra*, and that cable systems in the top 100 markets have a 20-channel capacity and provide an additional channel suitable for cablecasting and other forms of communication for each broadcast signal carried. See 37 Fed. Reg. 3269. The ACLU

Thus, although cable television need not be viewed as specifically the rendition of a broadcast service to be treated in all respects upon the same basis as traditional television broadcasting, it cannot realistically be viewed, as Midwest Video would have it, as an unrelated enterprise free of reasonable public service responsibilities to the community. As the Commission has recently stated (37 Fed. Reg. 3269):

Broadcast signals are being used as a basic component in the establishment of cable systems, and it is therefore appropriate that the fundamental goals of a national communications structure be furthered by cable—the opening of new outlets for local expression, the promotion of diversity in television programming, the advancement of educational and instructional television, and increased informational services of local governments. * * *

And in its letter to Congress of August 5, 1971, the Commission explained the approach it is taking in this field as one in which it has concluded that risks to the public interest which might result from possible adverse effects of authorized cable operations on broadcast services will be compensated for by utilization of the new technology of cablecasting to provide additional service to the public which was previously unavailable because of the physical limitations of the broadcast spectrum (31 F.C.C. 2d 115, 127):

brief also ignores the consideration relied upon by the Commission that cablecasting facilities and equipment obtained by a cable system for its own use will also be available for the use of others. See Pet. App. C., p. 39; *Cable Television Service*, 37 Fed. Reg. 3271-3272.

We will tailor our actions to take into account the public interest considerations stemming from possible impact of cable on broadcast services. We recognize that in any matter involving future projections, there are necessarily some risks. As we have also stated, what makes those risks so clearly worth taking is the chance of obtaining great benefits to the public from cable's new services. It follows that along with making distant or overlapping signals available for the first time in specified markets, we should act to require a bandwidth that will ensure the availability of these new services. Otherwise, some cable operators might construct systems adequate only to the carriage of broadcast signals, or might long postpone the availability of non-broadcast channels. We believe this would be a most unwise decision, since the use of non-broadcast bandwidth is of high public promise and can be profitable to the cable owner. Indeed, it may be the critical factor making for cable's success. The public interest, as well as the cable industry's economic interest, may well be found in reducing subscriber fees and relying proportionately more for revenue on the income from channel leasing. *In sum, we emphasize that the cable operator cannot accept the distant or overlapping signals that will be made available without also accepting the obligation to provide for substantial non-broadcast bandwidth. The two are integrally linked in the public interest judgment we have made.* [Emphasis in original.]

The rule at issue in the present case is thus central, in the Commission's judgment, to fulfillment of its

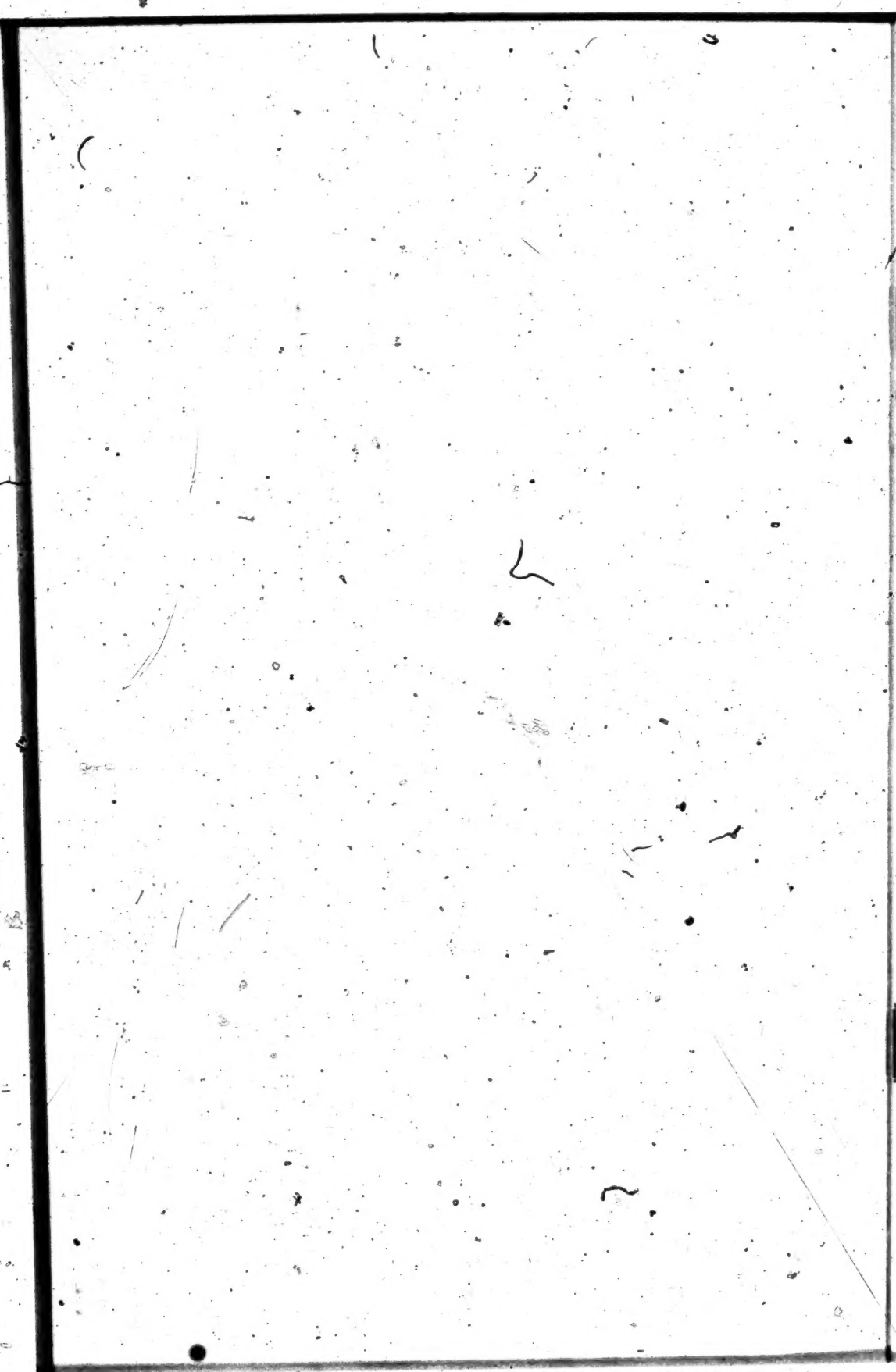
statutory responsibilities with respect to both television broadcast service and the closely related field of cable television service.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHN W. PETTIT,
General Counsel,
Federal Communications Commission.

APRIL 1972.



JUL 28 1972

MICHAEL RUDAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, *Petitioners,*

v.

MIDWEST VIDEO CORPORATION, *Respondent.*

PETITION FOR REHEARING

WAYNE W. OWEN
HARRY M. PLOTKIN
GEORGE H. SHAPIRO
DAVID TILLOTSON
Attorneys for Respondent

Of Counsel:

MOSES, McCLELLAN, ARNOLD,
OWEN & McDERMOTT
Union Life Building
Little Rock, Arkansas 72201

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

July, 1972

IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND FEDERAL
COMMUNICATIONS COMMISSION, *Petitioners*,

v.

MIDWEST VIDEO CORPORATION, *Respondent*.

PETITION FOR REHEARING

This case involves the validity of a regulation promulgated by the Federal Communications Commission requiring all CATV systems with 3,500 or more subscribers to originate programs as a condition to their remaining in business. Midwest Video Corporation challenged the validity of this regulation as being beyond the authority of the Commission. The Court below held that the Commission lacked authority to adopt the regulation.

On June 7, 1972, this Court entered its judgment and issued an opinion in which a plurality of four judges

joined concluding that the Commission did have authority to promulgate the regulation in question—that the requirement for CATV systems to originate programs is reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of the television broadcasting. A plurality, also of four judges, adopted the opposite point of view. They pointed out that origination of programming is a far cry from CATV operation. It "requires new investment and new and different equipment and an entirely different cast of personnel." (Slip Opinion, page 2). Moreover, the structure of the Communications Act is such that while a license from the Commission is required before a person can enter the broadcasting business and only qualified persons may obtain such licenses, the Commission's function is limited to passing on applications for license "[b]ut nowhere in the Act is there the slightest suggestion that a person may be compelled to enter the broadcasting or cablecasting field." (Slip Opinion, page 3). The dissenting Opinion concludes that "whether CATV systems should be required to originate programs is a decision that we are certainly not competent to make and . . . the Commission is not authorized to make. Congress is the agency to make the decision and Congress has not acted." (Slip Opinion, page 1).

Somewhat the same plaint is found in the concurring opinion of the Chief Justice. He concedes "that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." (Slip Opinion, page 2). He concludes however "Congress has created its instrumentality to regulate broadcasting, has given it pervasive power, and the Commission has generations of experience and 'feel' for the

problem. I therefore conclude that *until Congress acts the Commission should be allowed wide latitude. . .*" (*Ibid.*; Emphasis Supplied).

From a substantive point of view there is a remarkable similarity between the views of the four dissenting Justices and that of the Chief Justice. Both groups are obviously not satisfied that the Commission has acted within the scope of the statutory mandate set forth in the Communications Act. The minority would therefore set aside the Commission's regulation and leave to Congress the matter of whether the statute should be amended to confer jurisdiction upon the Commission. The Chief Justice, while adverting to the role of Congress, expresses the view that the action of the Commission should stand unless the Congress affirmatively disapproves.

Midwest submits that a rehearing should be granted to consider the nature of the authority which Congress has delegated to the Commission and the nature of the relationship between the Commission and Congress. It is apparent from a study of the Communications Act that Congress was careful to spell out the area of Commission jurisdiction and the manner in which it should exercise its power. In the area of broadcasting where the Commission exercises primary responsibility Congress made it clear that no person can operate a broadcast station unless he obtains a license from the Commission which commits him to operate in the public interest. But the statute is clear that the Commission is authorized to act only upon applications. It can pick and choose among those who seek authority to operate broadcast stations and can impose reasonable regulations upon those who do accept licenses. While the Commission can require a broadcast licensee to devote

a certain percentage of his broadcast time to local programs, there is nothing in the Communications Act whereby the Commission can compel a person to apply for a broadcast license against his will or force a broadcast applicant to build a station in a community different from the one for which he has applied or require a broadcast operator to establish a CATV system no matter how much the Commission believes the public would benefit from such mandated activity.

There ~~is~~ no reason in policy or law why a different result should be applicable to CATV—a field where the Commission exercises ancillary rather than primary responsibility. True, the Commission can, in light of *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) require a person to obtain Commission permission before operating a CATV system. And the Commission can impose reasonable regulations on the CATV operation such as the signals to be carried, technical quality of the service, non-duplication protection, etc. Moreover, the Commission can probably require that its consent be obtained before a person can engage in cablecasting (although this point has not been squarely decided either in *Southwestern* or the instant case) and can impose reasonable regulations upon such cablecasting so undertaken, including probably the obligation to carry a certain number of local programs. But it is an entirely different matter to require a CATV operator to become a cablecaster against his will. This is the equivalent of the Commission requiring a broadcast station to establish a CATV system or become a cablecaster. Sanctioning the Commission's approach would mean that the Commission possesses more authority with respect to its ancillary jurisdiction over CATV operations than it possesses over the pri-

mary field of broadcast operations. This is a power to be given, if at all, by Congress, not unilaterally assumed by the Commission.

In urging the appropriate rôle of Congress in this field, it is not necessary to predict whether or not Congress would act if the Commission's regulation were set aside. Under the Constitution this is a matter which is committed to the Congress and is not subject to the control of the Court or the Commission. In this connection it is not without significance to call attention to recent Congressional interest which has been evinced in the subject. Attached hereto are the remarks made by Senator McClellan on June 20, 1972 in connection with his introduction of S.J. Res. 247, a joint resolution extending the duration of copyright protection in certain cases. He specifically calls attention to the Commission's cable origination rules and concludes that it may be appropriate for the question of mandatory origination to be further reviewed in conjunction with the resolution by the Congress of the remaining cable television issues.

In seeking rehearing Midwest wishes to stress that it is not now challenging, nor has it in this litigation challenged, the pervasiveness of the Commission's jurisdiction over communications by wire or radio or the power of the Commission through its ancillary authority over CATV affirmatively to promote the basic objectives of the Communications Act. These questions are clearly and decisively resolved by the Court's opinions and are not questioned by Midwest. What Midwest seeks by its rehearing is a re-examination of the appropriate role of Congress with respect to Commission control over CATV—whether the mandate to CATV systems to become cablecasters against their will is a

matter on which Congress should legislate before the Commission acts or whether the Commission's regulations should stand unless and until Congress vetoes such action. The appropriate distribution of power between Congress, the Courts and the Commission requires that prior Congressional authority be obtained—that Congress not be relegated to the role of vetoer.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Court should grant a rehearing of this case.

Respectfully submitted,

WAYNE W. OWEN
Union Life Building
Little Rock, Arkansas 72201

HARRY M. PLOTKIN
GEORGE H. SHAPIRO
DAVID TILLOTSON
1815 H Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent

Of Counsel:

MOSES, McCLELLAN, ARNOLD,
OWEN & McDERMOTT
Union Life Building
Little Rock, Arkansas 72201

ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006

July, 1972

1998

1974

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the
4. fourth of these is the fact that the
5. fifth of these is the fact that the
6. sixth of these is the fact that the
7. seventh of these is the fact that the
8. eighth of these is the fact that the
9. ninth of these is the fact that the
10. tenth of these is the fact that the

APPENDIX

The following is a list of the names of the persons who have been appointed to the various positions in the various departments of the Government of the State of New York, for the year 1900.

[illegible]

matter of your Commission should be...
Commissioners...
Commissioners...
Commissioners...

James O. Thompson...
Commissioners...
Commissioners...

COMMISSIONERS

For the purpose of...
The Commission...

COMMISSIONERS

James O. Thompson...
Commissioners...

COMMISSIONERS

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

James O. Thompson...
Commissioners...

APPENDIX

Remarks of Senator McClellan, in connection with the introduction of S.J. Res. 247, Congressional Record, June 20, 1972, pp. 9772-9773:

By MR. McCLELLAN:

S.J. Res. 247. A joint resolution extending the duration of copyright protection in certain cases. Referred to the Committee on the Judiciary.

MR. McCLELLAN: Mr. President, as chairman of the Subcommittee on Patents, Trademarks, and Copyrights I introduce a joint resolution to extend the duration of copyright protection in certain cases.

The purpose of this legislation is to continue until December 31, 1974, the renewal term of any copyright subsisting on the date of approval of the joint resolution, or the term as extended by previously enacted public laws, where such term would otherwise expire prior to December 31, 1974. The justification for the prolongation of the renewal term of copyrights is that the pending legislation for the general revision of the copyright law includes a proposed increase in the length of the copyright term. The Congress has repeatedly expressed its will that the owners of expiring copyrights should not lose the benefits provided in the proposed new copyright law only because of the unfortunate circumstances which have delayed final action by Congress on the copyright bill.

Any substantial progress by the Congress on copyright revision legislation has been virtually impossible during the past several years because of the protracted delay of the Federal Communications Commission in adopting new cable television rules. A resolution of the cable television copyright issues was necessarily dependent upon the determination of the many regulatory issues. The FCC rules became effective on March 31 and it was only on June 16 that the Commission completed action on petitions for reconsidera-

tion of the rules. The completion of the Commission proceedings now paves the way for real progress in the Congress on the copyright bill.

It is apparent that adequate time does not remain in this Congress for the processing of this complex legislation. I presently know of no reason why the Subcommittee on Patents, Trademarks, and Copyrights cannot promptly report a revised bill in the next Congress. It shall be my intention to bring that bill to the floor at the earliest feasible date. Because certain provisions of the bill are highly controversial it is uncertain if it can be enacted into law during the first session of the 93d Congress. It will also be necessary to allow the Copyright Office a period of time to prepare for the administration of the new law and consequently the effective date of the legislation will have to be several months after its enactment. Under these circumstances it appears advisable to provide that the temporary extension of copyrights should continue until December 31, 1974.

The pending version of the copyright revision legislation, S. 644, other than for perfecting amendments, is identical to the text of the bill reported favorably by the subcommittee in the 91st Congress. The subcommittee has already determined its position on each of the many issues and in the absence of significant new developments I do not believe there is any necessity to repeat this detailed consideration. I know of no issue on which additional hearings are necessary.

One provision of the bill that will require some modification is the cable television section. The section approved by the subcommittee contains a coordinated resolution of copyright questions and of those regulatory issues that are necessarily related to copyright matters. The new rules of the FCC are generally consistent with the recommendations of the subcommittee and it is anticipated that the regulatory provisions now contained in S. 644 will be eliminated. The

subcommittee determined that all cable television systems should be subject to the copyright law and that the statute should grant such systems a compulsory license, subject to certain limitations relating to program exclusivity and sporting events, to carry the programs transmitted by specified broadcast signals. The subcommittee also approved a statutory CATV royalty schedule and established in chapter 8 of the legislation a copyright royalty tribunal to provide for periodic impartial review and adjustment of royalty rates.

Since the subcommittee action there have been two important CATV judicial decisions. In Columbia Broadcasting System, Inc. against TelePrompster, Inc. a Federal district Court interpreted the existing copyright statute as not applying to the secondary transmissions of a cable system even if the system is transmitting distant signals, using microwave, inserting advertising or originating its own programs. Previously the U.S. Supreme Court in *United Artists against Fortnightly* held that the activities of the cable system involved in that litigation did not constitute violation of the copyright law. Since the CBS case is now on appeal I do not wish to discuss the merits of that decision. The decision in that case does not change my opinion that cable systems should be under the provisions of the copyright law.

In another important cable television decision a sharply divided Supreme Court, in which there was no majority opinion, upheld the authority of the Federal Communications Commission to require certain cable systems to originate their own programs regardless of whether there is sufficient public demand to make such programing feasible. I have long felt that the action of the Commission was a dubious extension of its jurisdiction under the Communications Act and even if authorized by the Communications Act was not sound policy under existing conditions. The deciding vote in the Supreme Court was cast by the Chief Justice. I concur in his view that "I am not fully per-

suaded that the Commission has made the correct decision in this case and the thoughtful opinions in the Court of Appeals and the dissenting opinion here reflect some of my reservations." It is currently unclear what immediate action on this issue will be taken by the Commission. It may be appropriate for the question of mandatory origination to be further reviewed in conjunction with the resolution by the Congress of the remaining cable television issues.

The only other issue in the revision bill concerning which there has been significant developments subsequent to the action of the subcommittee concerns photocopying by libraries and other nonprofit institutions. A Commissioner of the Court of Claims has rendered the first judicial interpretation of the application of the Copyright Act of 1909 to library photocopying. He held that the systematic and widespread duplication of articles from copyrighted periodicals by the National Library of Medicine constituted infringement of copyright. Since this case is also on appeal I again shall refrain from discussing the substance of the litigation. I observe only that the subcommittee anticipated this problem and had consequently added a special library photocopying section to the revision bill.

The subcommittee has been advised that the representatives of authors and book and periodical publishers are now meeting with library associations and other nonprofit users to explore whether agreement can be reached on the photocopying section of the copyright bill. I also understand that there is some prospect of discussions among interested parties on other issues of the bill. I have instructed the counsel of the subcommittee to prepare a modified version of the pending bill for consideration of the subcommittee in the 93d Congress. Therefore, it is to be hoped that any discussions among the parties will proceed expeditiously so that the outcome of these deliberations may be known in sufficient time to be considered in the draft being prepared by the subcommittee staff.

CERTIFICATE

I, Harry M. Plotkin, hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

HARRY M. PLOTKIN

Syllabus

UNITED STATES ET AL. v. MIDWEST VIDEO CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 71-506. Argued April 19, 1972—Decided June 7, 1972

The Federal Communications Commission (FCC) promulgated a rule that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting [i. e., originating programs] and has available facilities for local production and presentation of programs other than automated services." Upon challenge of respondent, an operator of CATV systems subject to the new requirement, the Court of Appeals set aside the regulation on the ground that the FCC had no authority to issue it. *Held*: The judgment is reversed. Pp. 659-676.

441 F. 2d 1322, reversed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, concluded that:

1. The rule is within the FCC's statutory authority to regulate CATV at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *United States v. Southwestern Cable Co.*, 392 U. S., 157, 178. Pp. 659-670.

2. In the light of the record in this case, there is substantial evidence that the rule, with its 3,500 standard and as it is applied under FCC guidelines for waiver on a showing of financial hardship, will promote the public interest within the meaning of the Communications Act of 1934. Pp. 671-675.

THE CHIEF JUSTICE concluded that until Congress acts to deal with the problems brought about by the emergence of CATV, the FCC should be allowed wide latitude. Pp. 675-676.

BRENNAN, J., announced the Court's judgment and delivered an opinion in which WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in the result, *post*, p. 675. DOUGLAS, J., filed a dissenting opinion, in which STEWART, POWELL, and REHNQUIST, JJ., joined, *post*, p. 677.

Deputy Solicitor General Wallace argued the cause for the United States et al. With him on the briefs were *Solicitor General Griswold, Richard B. Stone, John W. Pettit, and Edward J. Kuhlmann.*

Harry M. Plotkin argued the cause for respondent. With him on the brief were *Wayne W. Owen, George H. Shapiro, and David Tillotson.*

Briefs of *amici curiae* urging affirmance were filed by *William J. Scott, Attorney General, Peter A. Fasseas, Special Assistant Attorney General, and Roland S. Hommet, Jr.,* for the State of Illinois; by *Paul Rodgers* for the National Association of Regulatory Utility Commissioners; and by *Melvin L. Wulf* for the American Civil Liberties Union.

MR. JUSTICE BRENNAN announced the judgment of the Court and an opinion in which MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join.

Community antenna television (CATV) was developed long after the enactment of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.*, as an auxiliary to broadcasting through the retransmission by wire of intercepted radio signals to viewers otherwise unable to receive them because of distance or local terrain.¹ In *United States v. Southwestern Cable Co.*, 392 U. S. 157 (1968), where we sustained the jurisdiction of

¹ "CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers." *United States v. Southwestern Cable Co.*, 392 U. S. 157, 161 (1968). They "perform either or both of two functions." First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae." *Id.*, at 163.

the Federal Communications Commission to regulate the new industry, at least to the extent "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting," *id.*, at 178, we observed that the growth of CATV since the establishment of the first commercial system in 1950 has been nothing less than "explosive." *Id.*, at 163.² The potential of the new industry to augment communication services now available is equally phenomenal.³ As we said in *Southwestern, id.*, at 164, CATV "[promises] for the future to provide a national communications system, in which signals from selected broadcasting centers would be transmitted to metropolitan areas throughout the country." Moreover, as the Commission has noted, "the expanding multichannel capacity of cable systems could be utilized to provide a variety of new communications services to homes and businesses within a community," such as facsimile reproduction of documents, electronic mail delivery, and information retrieval. Notice of Proposed Rulemaking and Notice of Inquiry, 15 F. C. C. 2d 417, 419-420 (1968). Perhaps more important, CATV systems can themselves originate programs, or "cablecast"—which means, the Commission has found, that CATV can "[increase] the number of local outlets for community self-expression and [augment] the public's choice of programs and types of service, without use of broadcast spectrum" *Id.*, at 421.

² There are now 2,678 CATV systems in operation, 1,916 CATV franchises outstanding for systems not yet in current operation, and 2,804 franchise applications pending. Weekly CATV Activity Addenda, 12 Television Digest 9 (Feb. 28, 1972).

³ For this reason the Commission has recently adopted the term "cable television" in place of CATV. See Report and Order on Cable Television Service; Cable Television Relay Service, 37 Fed. Reg. 3252 n. 9 (1972) (hereinafter cited as Report and Order on Cable Television Service).

Recognizing this potential, the Commission, shortly after our decision in *Southwestern*, initiated a general inquiry "to explore the broad question of how best to obtain, consistent with the public interest standard of the Communications Act, the full benefits of developing communications technology for the public, with particular immediate reference to CATV technology" *Id.*, at 417. In particular, the Commission tentatively concluded, as part of a more expansive program for the regulation of CATV,⁴ "that, for now and in general, CATV program origination is in the public interest," *id.*, at 421, and sought comments on a proposal "to condition the carriage of television broadcast signals (local or distant) upon a requirement that the CATV system also operate to a significant extent as a local outlet by origi-

⁴The early regulatory history of CATV, canvassed in *Southwestern*, need not be repeated here, other than to note that in 1966 the Commission adopted rules, applicable to both microwave and non-microwave CATV systems, to regulate the carriage of local signals, the duplication of local programming, and the importation of distant signals into the 100 largest television markets. See *infra*, at 659. The Commission's 1968 notice of proposed rulemaking addressed, in addition to the program origination requirement at issue here, whether advertising should be permitted on cablecasts and whether the broadcast doctrines of "equal time," "fairness," and sponsorship identification should apply to them. Other areas of inquiry included the use of CATV facilities to provide common carrier service; federal licensing and local regulation of CATV; cross-ownership of television stations and CATV systems; reporting and technical standards; and importation of distant signals into major markets. The notice offered concrete proposals in some of these areas, which were acted on in the Commission's First Report and Order, 20 F. C. C. 2d 201 (1969) (hereinafter cited as First Report and Order), and Report and Order on Cable Television Service. See also Memorandum Opinion and Order, 23 F. C. C. 2d 825 (1970) (hereinafter cited as Memorandum Opinion and Order). None of these regulations, aside from the cablecasting requirement, is now before us, see n. 14, *infra*, and we, of course, intimate no view on their validity.

nating." *Id.*, at 422. As for its authority to impose such a requirement, the Commission stated that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies." *Ibid.*

On the basis of comments received, the Commission on October 24, 1969, adopted a rule providing that "no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent^[5] as a local outlet by cablecasting^[6] and has available facilities for local production and presentation of programs other

⁵ "By significant extent [the Commission indicated] we mean something more than the origination of automated services (such as time and weather, news ticker, stock ticker, etc.) and aural services (such as music and announcements). Since one of the purposes of the origination requirement is to insure that cablecasting equipment will be available for use by others originating on common carrier channels, 'operation to a significant extent as a local outlet' in essence necessitates that the CATV operator have some kind of video cablecasting system for the production of local live and delayed programming (e. g., a camera and a video tape recorder, etc.)." First Report and Order 214.

⁶ "Cablecasting" was defined as "programming distributed on a CATV system which has been originated by the CATV operator or by another entity, exclusive of broadcast signals carried on the system." 47 CFR § 74.1101 (j). As this definition makes clear, cablecasting may include not only programs produced by the CATV operator, but "films and tapes produced by others, and CATV network programming." First Report and Order 214. See also *id.*, at 203. The definition has been altered to conform to changes in the regulation, see n. 7, *infra*, and now appears at 47 CFR § 76.5 (w). See Report and Order on Cable Television Service 3279. Although the definition now refers to programming "subject to the exclusive control of the cable operator," this is apparently not meant to effect a change in substance or to preclude the operator from cablecasting programs produced by others. See *id.*, at 3271.

than automated services." 47 CFR § 74.1111 (a).⁷ In a report accompanying this regulation, the Commission stated that the tentative conclusions of its earlier notice of proposed rulemaking:

"recognize the great potential of the cable technology to further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services. . . . They also reflect our view that a multi-purpose CATV operation combining carriage of broadcast signals with program origination and common carrier services,^[8] might best exploit cable channel capacity to the advantage of the public and promote the basic purpose for which this Commission was created: 'regulating interstate and foreign commerce in com-

⁷ This requirement, applicable to both microwave and non-microwave CATV systems without any "grandfathering" provision, was originally scheduled to go into effect on January 1, 1971. See First Report and Order 223. On petitions for reconsideration, however, the effective date was delayed until April 1, 1971, see Memorandum Opinion and Order 827, 830, and then, after the Court of Appeals decision below, suspended pending final judgment here. See 36 Fed. Reg. 10876 (1971). Meanwhile, the regulation has been revised and now appears at 47 CFR § 76.201 (a). The revision has no significance for this case. See Memorandum Opinion and Order 827, 830 (revision effective Aug. 14, 1970); Report and Order on Cable Television Service 3271, 3277, 3287 (revision effective Mar. 31, 1972).

⁸ Although the Commission did not impose common-carrier obligations on CATV systems in its 1969 report, it did note that "the origination requirement will help ensure that origination facilities are available for use by others originating on leased channels." First Report and Order 209. Public access requirements were introduced in the Commission's Report and Order on Cable Television Service, although not directly under the heading of common-carrier service. See Report and Order on Cable Television Service 3277.

munication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges . . . (sec. 1 of the Communications Act).⁹ After full consideration of the comments filed by the parties, we adhere to the view that program origination on CATV is in the public interest.”¹⁰ First Report and Order, 20 F. C. C. 2d-201, 202 (1969).

⁹ Section 1 of the Act, 48 Stat. 1064, as amended, 47 U. S. C. § 151, states:

“For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide; and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the ‘Federal Communications Commission,’ which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.”

¹⁰ In so concluding, the Commission rejected the contention that a prohibition on CATV originations was “necessary to prevent potential fractionalization of the audience for broadcast services and a siphoning off of program material and advertising revenue now available to the broadcast service.” First Report and Order 202. “[B]roadcasters and CATV originators . . .,” the Commission reasoned, “stand on the same footing in acquiring the program material with which they compete.” *Id.*, at 203. Moreover, “a loss of audience or advertising revenue to a television station is not in itself a matter of moment to the public interest unless the result is a net loss of television service,” *ibid.*—an impact that the Commission found had no support in the record and that, in any event, it

The Commission further stated, *id.*, at 208-209:

"The use of broadcast signals has enabled CATV to finance the construction of high capacity cable facilities. In requiring in return for these uses of radio that CATV devote a portion of the facilities to providing needed origination service, we are furthering our statutory responsibility to 'encourage the larger and more effective use of radio in the public interest' (sec. 303 (g)).¹¹ The requirement will also facilitate the more effective performance of the Commission's duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities (sec. 307 (b)),¹² in areas where we have been unable to accomplish this through broadcast media."¹³

would undertake to prevent should the need arise. See *id.*, at 203-204. See also Memorandum Opinion and Order 826 n. 3, 828-829.

¹¹ Section 303 (g), 48 Stat. 1082, 47 U. S. C. § 303, states that "[e]xcept as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall" "(g) [s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest"

¹² Section 307 (b), 48 Stat. 1084, as amended, 47 U. S. C. § 307 (b), states:

"In considering applications for licenses [for the transmission of energy, communications, or signals by radio], and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

¹³ The Commission added: "[I]n authorizing the receipt, forwarding, and delivery of broadcast signals, the Commission is in effect authorizing CATV to engage in radio communication, and may condition this authorization upon reasonable requirements governing activities which are closely related to such radio communication and facilities." First Report and Order 209 (citing, *inter alia*,

Upon the challenge of respondent Midwest Video Corp., an operator of CATV systems subject to the new cablecasting requirement, the United States Court of Appeals for the Eighth Circuit set aside the regulation on the ground that the Commission "is without authority to impose" it. 441 F. 2d 1322, 1328 (1971).¹⁴ "The Commission's power [over CATV] . . .," the court explained, "must be based on the Commission's right to adopt rules that are reasonably ancillary to its responsi-

§ 301 of the Communications Act, 48 Stat. 1081, 47 U. S. C. § 301 (generally requiring licenses for the use or operation of any apparatus for the interstate or foreign transmission of energy, communications, or signals by radio)). Since, as we hold, *infra*, the authority of the Commission recognized in *Southwestern* is sufficient to sustain the cablecasting requirement at issue here, we need not, and do not, pass upon the extent of the Commission's jurisdiction over CATV under § 301. See, e. g., *FCC v. Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *General Telephone Co. of Cal. v. FCC*, 134 U. S. App. D. C. 116, 130-131, 413 F. 2d 390, 404-405 (1969); *Philadelphia Television Broadcasting Co. v. FCC*, 123 U. S. App. D. C. 298, 300, 359 F. 2d 282, 284 (1966):

"In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective."

¹⁴ Although this holding was specifically limited to "existing cable television operators," the court's reasoning extended more broadly to all CATV systems, and, indeed, its judgment set aside the regulation in all its applications. See 441 F. 2d, at 1328.

Respondent also challenged other regulations, promulgated in the Commission's First Report and Order and Memorandum Opinion and Order, dealing with advertising, "equal time," "fairness," sponsorship identification, and per-program or per-channel charges on cablecasts. The Court of Appeals, however, did not "[pass] on the power of the FCC . . . to prescribe reasonable rules for such CATV operators who voluntarily choose to originate programs," *id.*, at 1326, since respondent acknowledged that it did not want to cablecast and hence lacked standing to attack those rules. See *id.*, at 1328.

bilities in the broadcasting field," *id.*, at 1326—a standard that the court thought the Commission's regulation "goes far beyond." *Id.*, at 1327.¹⁵ The court's opinion may also be understood to hold the regulation invalid as not supported by substantial evidence that it would serve the public interest. "The Commission report itself shows," the court said, "that upon the basis of the record made, it is highly speculative whether there is sufficient expertise or information available to support a finding that the origination rule will further the public interest." *Id.*, at 1328. "Entering into the program origination field involves very substantial expenditures," *id.*, at 1327, and "[a] high probability exists that cablecasting will not be self-supporting," that there will be a "substantial increase" in CATV subscription fees, and that "in some instances" CATV operators will be driven out of business. *Ibid.*¹⁶ We granted certiorari. 404 U. S. 1014 (1972). We reverse.

¹⁵ The court held, in addition, that the Commission may not require CATV operators "as a condition to [their] right to use . . . captured [broadcast] signals in their existing franchise operation to engage in the entirely new and different business of originating programs." *Id.*, at 1327. This holding presents no separate question from the "reasonably ancillary" issue that need be considered here. See n. 22, *infra*.

¹⁶ Concurring in the result in a similar vein, Judge Gibson concluded that although "the FCC has authority over CATV systems," "the order under review is confiscatory and hence arbitrary," 441 F. 2d, at 1328, for the regulation "would be extremely burdensome and perhaps remove from the CATV field many entrepreneurs who do not have the resources, talent and ability to enter the broadcasting field." *Id.*, at 1329. If this is to suggest that the regulation is invalid merely because it burdens CATV operators or may even force some of them out of business, the argument is plainly incorrect. See n. 31, *infra*. The question would still remain whether the Commission reasonably found on substantial evidence that the regulation on balance would promote policy objectives committed to its jurisdiction under the Communications Act, which, for the reasons given *infra*, we hold that it did.

I

In 1966 the Commission promulgated regulations that, in general, required CATV systems (1) to carry, upon request and in a specified order of priority within the limits of their channel capacity, the signals of broadcast stations into whose service area they brought competing signals; (2) to avoid, upon request, the duplication on the same day of local station programming; and (3) to refrain from bringing new distant signals into the 100 largest television markets except upon a prior showing that that service would be consistent with the public interest. See Second Report and Order, 2 F. C. C. 2d 725 (1966). In assessing the Commission's jurisdiction over CATV against the backdrop of these regulations,¹⁷ we focused in *Southwestern* chiefly on § 2 (a) of the Communications Act, 48 Stat. 1064, as amended, 47 U. S. C. § 152 (a), which provides in pertinent part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio . . . , which originates and/or is received within the United States, and to all persons engaged within the United States in such communication" In view of the Act's definitions of "communication by wire" and "communication by radio,"¹⁸ the interstate character of CATV services,¹⁹

¹⁷ *Southwestern* reviewed, but did not specifically pass upon the validity of, the regulations. See 392 U. S., at 167. Their validity was, however, subsequently and correctly upheld by courts of appeals as within the guidelines of that decision. See, e. g., *Black Hills Video Corp. v. FCC*, 399 F. 2d 65 (CA8 1968).

¹⁸ Sections 3 (a), (b), 48 Stat. 1065, 47 U. S. C. §§ 153 (a), (b), define these terms to mean "the transmission" "of writing, signs, signals, pictures, and sounds of all kinds," whether by cable or radio, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

¹⁹ "Nor can we doubt that CATV systems are engaged in interstate communication, even where . . . the intercepted signals ema-

and the evidence of congressional intent that "[t]he Commission was expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio,'" 392 U. S., at 167-168 (footnotes omitted), we held that § 2 (a) amply covers CATV systems and operations. We also held that § 2 (a) is itself a grant of regulatory power and not merely a prescription of the forms of communication to which the Act's other provisions governing common carriers and broadcasters apply:

"We cannot [we said] construe the Act so restrictively. Nothing in the language of § [2 (a)], in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. . . . Certainly Congress could not in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' *F. C. C. v. Pottsville Broadcasting Co.*, [309 U. S.],

pate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences; [CATV operators] thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize [CATV] activities as intrastate would disregard the character of the television industry, and serve merely to prevent the national regulation that 'is not only appropriate but essential to the efficient use of radio facilities.' *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 279." 392 U. S., at 168-169.

at 138, that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.' Thus, '[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.' [*Ibid.*] Congress in 1934 acted in a field that was demonstrably 'both new and dynamic,' and it therefore gave the Commission 'a comprehensive mandate,' with 'not niggardly but expansive powers.' *National Broadcasting Co. v. United States*, 319 U. S. 190, 219. We have found no reason to believe that § [2] does not, as its terms suggest, confer regulatory authority over 'all interstate . . . communication by wire or radio.' *Id.*, at 172-173 (footnotes omitted).

This conclusion, however, did not end the analysis, for § 2 (a) does not in and of itself prescribe any objectives for which the Commission's regulatory power over CATV might properly be exercised. We accordingly went on to evaluate the reasons for which the Commission had asserted jurisdiction and found that "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its other responsibilities." *Id.*, at 173. In particular, we found that the Commission had reasonably determined that "the unregulated explosive growth of CATV," especially through "its importation of distant signals into the service areas of local stations" and the resulting division of audiences and revenues, threatened to "deprive the public of the various benefits of [the] system of local broadcasting stations" that the Commission was charged with developing and overseeing under § 307 (b) of the

Act.²⁰ *Id.*, at 175. We therefore concluded, without expressing any view "as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes," that the Commission does have jurisdiction over CATV "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting . . . [and] may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.'" *Id.*, at 178 (quoting § 303 (r) of the Act, 50 Stat. 191, 47 U. S. C. § 303 (r)).

The parties now before us do not dispute that in light of *Southwestern* CATV transmissions are subject to the Commission's jurisdiction as "interstate . . . communication by wire or radio" within the meaning of § 2 (a) even insofar as they are local cablecasts.²¹ The contro-

²⁰ See n. 12, *supra*. See also §§ 303 (f), (h), 48 Stat. 1082, 47 U. S. C. §§ 303 (f), (h) (authorizing the Commission to prevent interference among stations and to establish areas to be served by them respectively). "In particular, the Commission feared that CATV might . . . significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters." 392 U. S., at 175-176.

²¹ This, however, is contested by the State of Illinois as *amicus curiae*. It is, nevertheless, clear that cablecasts constitute communication by wire (or radio if microwave transmission is involved), as well as interstate communication if the transmission itself has moved interstate, as the Commission has authorized and encouraged. See First Report and Order 207-208 (regional and national interconnections) and n. 6, *supra*. The capacity for interstate non-broadcast programming may in itself be sufficient to bring cablecasts within the compass of § 2 (a). In *Southwestern* we declined to carve CATV broadcast transmissions, for the purpose of determining the extent of the Commission's regulatory authority, into interstate and intrastate components. See n. 19, *supra*. This result was justified by the extent of interstate broadcast programming, the interdependencies between the two components, and the need to preserve the "unified and comprehensive regulatory system

versy, instead, centers on whether the Commission's program-origination rule is "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting."²² We hold that it is.

for the [broadcasting] industry.'" 392 U. S., at 168 (quoting *FCC v. Pottsville Broadcasting Co.*, n. 13, *supra*, at 137). A similar rationale may apply here, despite the lesser, "interstate content" of cablecasts at present.

But we need not now decide that question because, in any event, CATV operators have, by virtue of their carriage of broadcast signals, necessarily subjected themselves to the Commission's comprehensive jurisdiction. As MR. CHIEF JUSTICE (then Judge) BURGER has stated in a related context:

"The Petitioners [telephone companies providing CATV channel distribution facilities] have, by choice, inserted themselves as links in this indivisible stream and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission." *General Telephone Co. of Cal. v. FCC*, n. 13, *supra*, at 127, 413 F. 2d, at 401.

The devotion of CATV systems to broadcast transmission—together with the interdependencies between that service and cablecasts, and the necessity for unified regulation—plainly suffices to bring cablecasts within the Commission's § 2 (a) jurisdiction. See generally Barnett, *State, Federal, and Local Regulation of Cable Television*, 47 Notre Dame Law. 685, 721-723, 726-734 (1972).

²² Since "[t]he function of CATV systems has little in common with the function of broadcasters," *Fortnightly Corp. v. United Artists Television*, 392 U. S. 390, 400 (1968), and since "[t]he fact that . . . property is devoted to a public use on certain terms does not justify . . . the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the [owner] has expressly or impliedly assumed," *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585, 595 (1915), respondent also argues that CATV operators may not be required to cablecast as a condition for their customary service of carrying broadcast signals. This conclusion might follow only if the program-origination requirement is not reasonably ancillary to the Commission's jurisdiction over broadcasting. For, as we held in *Southwestern*, CATV operators are, at least to that

At the outset we must note that the Commission's legitimate concern in the regulation of CATV is not limited to controlling the competitive impact CATV may have on broadcast services. *Southwestern* refers to the Commission's "various responsibilities for the regulation of television broadcasting." These are considerably more numerous than simply assuring that broadcast stations operating in the public interest do not go out of business. Moreover, we must agree with the Commission that its "concern with CATV carriage of broadcast signals is not just a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies." *Supra*, at 653. Since the avoidance of adverse effects is itself the furtherance of statutory policies, no sensible distinction even in theory can be drawn along those lines. More important, CATV systems, no less than broadcast stations, see, e. g., *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266 (1933) (deletion of a station), may enhance as well as impair the appropriate

extent, engaged in a business subject to the Commission's regulation. Our holding on the "reasonably ancillary" issue is therefore dispositive of respondent's additional claim. See *infra*; at 669-670.

It should be added that *Fortnightly Corp. v. United Artists Television*, *supra*, has no bearing on the "reasonably ancillary" question. That case merely held that CATV operators who retransmit, but do not themselves originate copyrighted works do not "perform" them within the meaning of the Copyright Act, 61 Stat. 652, as amended, 17 U. S. C. § 1, since "[e]ssentially, [that kind of] a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals . . ." 392 U. S., at 399. The analogy thus drawn between CATV operations and broadcast viewing for copyright purposes obviously does not dictate the extent of the Commission's authority to regulate CATV under the Communications Act. Indeed, *Southwestern*, handed down only a week before *Fortnightly*, expressly held that CATV systems are not merely receivers, but transmitters of interstate communication subject to the Commission's jurisdiction under that Act. See 392 U. S., at 168.

provision of broadcast services. Consequently, to define the Commission's power in terms of the protection, as opposed to the advancement, of broadcasting objectives would artificially constrict the Commission in the achievement of its statutory purposes and be inconsistent with our recognition in *Southwestern* "that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' . . . that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.'" *Supra*, at 660-661.²³

The very regulations that formed the backdrop for our decision in *Southwestern* demonstrate this point. Those regulations were, of course, avowedly designed to guard broadcast services from being undermined by unregulated CATV growth. At the same time, the Commission recognized that "CATV systems . . . have arisen in response to public need and demand for improved television service and perform valuable public services in this respect." Second Report and Order, 2 F. C. C. 2d 725, 745 (1966).²⁴ Accordingly, the Commission's express purpose was not:

"to deprive the public of these important benefits or to restrict the enriched programing selection which

²³ See also *General Telephone Co. of Cal. v. FCC*, n. 13, *supra*, at 124, 413 F. 2d, at 398:

"Over the years, the Commission has been required to meet new problems concerning CATV and as cases have reached the courts the scope of the Act has been defined, as Congress contemplated would be done, so as to avoid a continuing process of statutory revision. To do otherwise in regulating a dynamic public service function such as broadcasting would place an intolerable regulatory burden on the Congress—one which it sought to escape by delegating administrative functions to the Commission."

²⁴ The Commission elaborated:

"CATV . . . has made a significant contribution to meeting the public demand for television service in areas too small in popula-

CATV makes available. Rather, our goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303 (g) of the act [nn. 9 and 11, *supra*]), both those who are cable viewers and those dependent on off-the-air service. The new rules . . . are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service." *Id.*, at 745-746.²⁵

In implementation of this approach CATV systems were required to carry local broadcast station signals to encourage diversified programming suitable to the community's needs as well as to prevent a diversion of audiences and advertising revenues.²⁶ The duplication of

tion to support a local station, or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for good reception of multiple program choices, particularly the three full network services. In thus contributing to the realization of some of the most important goals which have governed our allocations planning, CATV has clearly served the public interest 'in the larger and more effective use of radio.' And, even in the major market, where there may be no dearth of service . . . , CATV may . . . increase viewing opportunities, either by bringing in programming not otherwise available or, what is more likely, bringing in programming locally available but at times different from those presented by the local stations." Second Report and Order, 2 F. C. C. 2d 725, 781 (1966). See also *id.*, at 745.

²⁵ This statement, made with reference only to the local carriage and non-duplication requirements, was no less true of the distant importation rule. See *id.*, at 781-782.

²⁶ The regulation, for example, retained the provision of the Commission's earlier rule governing CATV microwave systems under which a local signal was not required to be carried "if (1) it substantially duplicates the network programming of a signal of a higher grade, and (2) carrying it would—because of limited channel capac-

649

Opinion of BRENNAN, J.

local station programing was also forbidden for the latter purpose, but only on the same day as the local broadcast so as "to preserve, to the extent practicable, the valuable public contribution of CATV in providing wider access to nationwide programing and a wider selection of programs on any particular day." *Id.*, at 747. Finally, the distant-importation rule was adopted to enable the Commission to reach a public-interest determination weighing the advantages and disadvantages of the proposed service on the facts of each individual case. See *id.*, at 776, 781-782. In short, the regulatory authority asserted by the Commission in 1966 and generally sustained by this Court in *Southwestern* was authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting.

In this light the critical question in this case is whether the Commission has reasonably determined that its origination rule will "further the achievement of long-estab-

ity—prevent the system from carrying a nonnetwork signal, which would contribute to the diversity of its service." First Report and Order, 38 F. C. C. 683, 717 (1965). See Second Report and Order, n. 24, *supra*, at 752-753. Moreover, CATV operators were warned that, in reviewing their discretionary choice of stations to carry among those of equal priority in certain circumstances, the Commission would "give particular consideration to any allegation that the station not carried is one with closer community ties." Second Report and Order, *supra*, at 755. In addition, operators were required to carry the signals of local satellite stations even if they also carried the signals of the satellites' parents; otherwise, "the satellite [might] lose audience for which it may be originating some local programing and [find] its incentive to originate programs [reduced]." *Id.*, at 755-756. Finally, the Commission indicated that, in considering waivers of the regulation, it would "[accord] substantial weight" to such considerations as whether "the programing of stations located within the State would be of greater interest than those of nearer, but out-of-State stations [otherwise required to be given priority in carriage]—e. g., coverage of political elections and other public affairs of statewide concern." *Id.*, at 753.

lished regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services” *Supra*, at 654. We find that it has.

The goals specified are plainly within the Commission's mandate for the regulation of television broadcasting.²⁷ In *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943), for example, we sustained Commission regulations governing relations between broadcast stations and network organizations for the purpose of preserving the stations' ability to serve the public interest through their programming. Noting that “[t]he facilities of radio are not large enough to accommodate all who wish to use them,” *id.*, at 216, we held that the Communications “Act does not restrict the Commission merely to supervision of [radio] traffic.” It puts upon the Commission the burden of determining the composition of that traffic.” *Id.*, at 215-216. We then upheld the Commission's judgment that:

“‘[w]ith the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them.’” *Id.*, at 218.

“‘A station licensee must retain sufficient freedom of action to supply the program . . . needs of the local community. Local program service is a vital part of community life. — A station should be ready,

²⁷ As the Commission stated, “it has long been a basic tenet of national communications policy that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’ *Associated Press v. United States*, 326 U. S. 1, 20; *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U. S. 367” First Report and Order 205.

able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest." *Id.*, at 203.

Equally plainly the broadcasting policies the Commission has specified are served by the program-origination rule under review. To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming—the same objective underlying regulations sustained in *National Broadcasting Co. v. United States*, *supra*, as well as the local-carriage rule reviewed in *Southwestern* and subsequently upheld. See *supra*, at 666 and nn. 17 and 26, *supra*. In essence the regulation is no different from Commission rules governing the technological quality of CATV broadcast carriage. In the one case, of course, the concern is with the strength of the picture and voice received by the subscriber, while in the other it is with the content of the programming offered. But in both cases the rules serve the policies of §§ 1 and 303 (g) of the Communications Act on which the cablecasting regulation is specifically premised, see *supra*, at 654–656,²⁸ and also, in the Commission's words,

²⁸ Respondent apparently does not dispute this, but contends instead that §§ 1 and 303 (g) merely state objectives without granting power for their implementation. See Brief for Midwest Video Corp. 24. The cablecasting requirement, however, is founded on those provisions for the policies they state and not for any regulatory power they might confer. The regulatory power itself may be found, as in *Southwestern*, see *supra*, at 660, 662, in 47 U. S. C. §§ 152 (a), 303 (r).

"facilitate the more effective performance of [its] duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities" under § 307 (b). *Supra*, at 656.²⁹ In sum, the regulation preserves and enhances the integrity of broadcast signals and therefore is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."

Respondent, nevertheless, maintains that just as the Commission is powerless to require the provision of television broadcast services where there are no applicants for station licenses no matter how important or desirable those services may be, so, too, it cannot require CATV operators unwillingly to engage in cablecasting. In our view, the analogy respondent thus draws between entry into broadcasting and entry into cablecasting is misconceived. The Commission is not attempting to compel wire service where there has been no commitment to undertake it. CATV operators to whom the cablecasting rule applies have voluntarily engaged themselves in providing that service, and the Commission seeks only to ensure that it satisfactorily meets community needs within the context of their undertaking.

For these reasons we conclude that the program-origination rule is within the Commission's authority recognized in *Southwestern*.

²⁹ Respondent asserts that "it is difficult to see how a mandatory [origination] requirement . . . can be said to aid the Commission in preserving the availability of broadcast stations to the several states and communities." Brief for Midwest Video Corp. 24. Respondent ignores that the provision of additional programming outlets by CATV necessarily affects the fairness, efficiency, and equity of the distribution of television services. We have no basis, it may be added, for overturning the Commission's judgment that the effect in this regard will be favorable. See *supra*, at 654-655 and n. 10.

II

The question remains whether the regulation is supported by substantial evidence that it will promote the public interest. We read the opinion of the Court of Appeals as holding that substantial evidence to that effect is lacking because the regulation creates the risk that the added burden of cablecasting will result in increased subscription rates and even the termination of CATV services. That holding is patently incorrect in light of the record.

In first proposing the cablecasting requirement, the Commission noted that "[t]here may . . . be practical limitations [for compliance] stemming from the size of some CATV systems" and accordingly sought comments "as to a reasonable cutoff point [for application of the regulation] in light of the cost of the equipment and personnel minimally necessary for local originations." Notice of Proposed Rulemaking and Notice of Inquiry, 15 F. C. C. 2d 417, 422 (1968). The comments filed in response to this request included detailed data indicating, for example, that a basic monochrome system for cablecasting could be obtained and operated for less than an annual cost of \$21,000 and a color system, for less than \$56,000. See First Report and Order, 20 F. C. C. 2d 201, 210 (1969). This information, however, provided only a sampling of the experience of the CATV systems already engaged in program origination. Consequently, the Commission:

"decided not to prescribe a permanent minimum cutoff point for required origination on the basis of the record now before us. The Commission intends to obtain more information from originating systems about their experience, equipment, and the nature of the origination effort. . . . In the meantime, we

will prescribe a very liberal standard for required origination, with a view toward lowering this floor in . . . further proceedings, should the data obtained in such proceedings establish the appropriateness and desirability of such action." *Id.*, at 213.

On this basis the Commission chose to apply the regulation to systems with 3,500 or more subscribers, effective January 1, 1971.

"This standard [the Commission explained] appears more than reasonable in light of the [data filed], our decision to permit advertising at natural breaks . . . , and the 1-year grace period. Moreover, it appears that approximately 70 percent of the systems now originating have fewer than 3,500 subscribers; indeed, about half of the systems now originating have fewer than 2,000 subscribers. . . . [T]he 3,500 standard will encompass only a very small percentage of existing systems at present subscriber levels, less than 10 percent." *Ibid.*

On petitions for reconsideration the Commission observed that it had "been given no data tending to demonstrate that systems with 3,500 subscribers cannot cablecast without impairing their financial stability, raising rates or reducing the quality of service." Memorandum Opinion and Order, 23 F. C. C. 2d 825, 826 (1970). The Commission repeated that "[t]he rule adopted is minimal in the light of the potentials of cablecasting,"³⁰ but, nonetheless, on its own motion postponed the effective date of the regulation to April 1, 1971, "to afford additional preparation time." *Id.*, at 827.

This was still not the Commission's final effort to tailor the regulation to the financial capacity of CATV oper-

³⁰ Commissioner Bartley, however, dissented on the ground that the regulation should apply only to systems with over 7,500 subscribers. Memorandum Opinion and Order 831.

ators. In denying respondent's motion for a stay of the effective date of the rule, the Commission reiterated that "there has been no showing made to support the view that compliance . . . would be an unsustainable burden." Memorandum Opinion and Order, 27 F. C. C. 2d 778, 779 (1971). On the other hand, the Commission recognized that new information suggested that CATV systems of 10,000 ultimate subscribers would operate at a loss for at least four years if required to cablecast. That information, however, was based on capital expenditure and annual operating cost figures "appreciably higher" than those first projected by the Commission. *Ibid.* The Commission concluded:

"While we do not consider that an adequate showing has been made to justify general change, we see no public benefit in risking injury to CATV systems in providing local origination. Accordingly, if CATV operators with fewer than 10,000 subscribers request *ad hoc* waiver of [the regulation], they will not be required to originate pending action on their waiver requests. . . . Systems of more than 10,000 subscribers may also request waivers, but they will not be excused from compliance unless the Commission grants a requested waiver [The] benefit [of cablecasting] to the public would be delayed if the . . . stay [requested by respondent] is granted, and the stay would, therefore, do injury to the public's interest." *Ibid.*

This history speaks for itself. The cablecasting requirement thus applied is plainly supported by substantial evidence that it will promote the public interest.³¹ Indeed, respondent does not appear to argue

³¹ Nor is the regulation infirm for its failure to grant "grandfather" rights, see n. 7, *supra*, as the Commission warned would be the case in its Notice of Proposed Rulemaking and Notice of

to the contrary. See Tr. of Oral Arg. 43-44. It was, of course, beyond the competence of the Court of Appeals itself to assess the relative risks and benefits of cablecasting. As we said in *National Broadcasting Co. v. United States*, 319 U. S., at 224:

"Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to

Inquiry, 15 F. C. C. 2d 417, 424 (1968). See, e. g., *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 282 (1933) ("the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy"). Judge Tuttle has elaborated, *General Telephone Co. of Southwest v. United States*, 449 F. 2d 846, 863-864 (CA5 1971):

"In a complex and dynamic industry such as the communications field, it cannot be expected that the agency charged with its regulation will have perfect clairvoyance. Indeed as Justice Cardozo once said, 'Hardship must at times result from postponement of the rule of action till a time when action is complete. It is one of the consequences of the limitations of the human intellect and of the denial to legislators and judges of infinite prevision.' Cardozo, *The Nature of the Judicial Process* 145 (1921). The Commission, thus, must be afforded some leeway in developing policies and rules to fit the exigencies of the burgeoning CATV industry. Where the on-rushing course of events [has] outpaced the regulatory process, the Commission should be enabled to remedy the [problem] . . . by retroactive adjustments, provided they are reasonable. . . .

"Admittedly the rule here at issue has an effect on activities embarked upon prior to the issuance of the Commission's Final Order and Report. Nonetheless the announcement of a new policy will inevitably have retroactive consequences. . . . The property of regulated industries is held subject to such limitations as may reasonably be imposed upon it in the public interest and the courts have frequently recognized that new rules may abolish or modify pre-existing interests."

With regard to federal infringement of franchise rights, see generally Barnett, n. 21, *supra*, at 703-705 and n. 116.

BURGER, C. J., concurring in result

say that the 'public interest' will [in fact] be furthered or retarded by the . . . [regulation]."

See also, e. g., *United States v. Storer Broadcasting Co.*, 351 U. S. 192, 203 (1956); *General Telephone Co. of Southwest v. United States*, 449 F. 2d 846, 858-859, 862-863 (CA5 1971).

Reversed.

MR. CHIEF JUSTICE BURGER, concurring in the result.

This case presents questions of extraordinary difficulty and sensitivity in the communications field, as the opinions of the divided Court of Appeals and our own divisions reflect. As MR. JUSTICE BRENNAN has noted, Congress could not anticipate the advent of CATV when it enacted the regulatory scheme nearly 40 years ago. Yet that statutory scheme plainly anticipated the need for comprehensive regulation as pervasive as the reach of the instrumentalities of broadcasting.

In the four decades spanning the life of the Communications Act, the courts have consistently construed the Act as granting pervasive jurisdiction to the Commission to meet the expansion and development of broadcasting. That approach was broad enough to embrace the advent of CATV, as indicated in the plurality opinion. CATV is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act.

Concededly, the Communications Act did not explicitly contemplate either CATV or the jurisdiction the Commission has now asserted. However Congress was well aware in the 1930's that broadcasting was a dynamic instrumentality, that its future could not be predicted, that scientific developments would inevitably enlarge the role and scope of broadcasting, and that in consequence

regulatory schemes must be flexible and virtually open-ended.

Candor requires acknowledgment, for me at least, that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts.

I agree with the plurality's rejection of any meaningful analogy between requiring CATV operators to develop programming and the concept of commandeering someone to engage in broadcasting. Those who exploit the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.

I am not fully persuaded that the Commission has made the correct decision in this case and the thoughtful opinions in the Court of Appeals and the dissenting opinion here reflect some of my reservations. But, the scope of our review is limited and does not permit me to resolve this issue as perhaps I would were I a member of the Federal Communications Commission. That I might take a different position as a member of the Commission gives me no license to do so here. Congress has created its instrumentality to regulate broadcasting, has given it pervasive powers, and the Commission has generations of experience and "feel" for the problem. I therefore conclude that until Congress acts, the Commission should be allowed wide latitude and I therefore concur in the result reached by this Court.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST concur, dissenting.

The policies reflected in the plurality opinion may be wise ones. But whether CATV systems should be required to originate programs is a decision that we certainly are not competent to make and in my judgment the Commission is not authorized to make. Congress is the agency to make the decision and Congress has not acted.

CATV captures TV and radio signals, converts the signals, and carries them by microwave relay transmission or by coaxial cables into communities unable to receive the signals directly. In *United States v. Southwestern Cable Co.*, 392 U. S. 157, we upheld the power of the Commission to regulate the transmission of signals. As we said in that case:

"CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae. As the number and size of CATV systems have increased, their principal function has more frequently become the importation of distant signals." *Id.*, at 163.

CATV evolved after the Communications Act of 1934, 48 Stat. 1064, was passed. But we held that the reach of the Act, which extends "to all interstate and foreign communication by wire or radio," 47 U. S. C. § 152 (a), was not limited to the precise methods of communication then known. 392 U. S., at 173.

Compulsory origination of programs is, however, a far cry from the regulation of communications approved in

Southwestern Cable. Origination requires new investment and new and different equipment, and an entirely different cast of personnel.¹ See 20 F. C. C. 2d 201, 210-211. We marked the difference between communication and origination in *Fortnightly Corp. v. United Artists Television*, 392 U. S. 390, and made clear how foreign the origination of programs is to CATV's traditional transmission of signals. In that case, CATV was sought to be held liable for infringement of copyrights of movies licensed to broadcasters and carried by CATV. We held CATV not liable, saying:

"Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

¹ In light of the striking difference between origination and communication, the suggestion that "the regulation is no different from Commission rules governing the technological quality of CATV broadcast carriage," *ante*, at 669, appears misconceived.

"The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." *Id.*, at 399-401.

The Act forbids any person from operating a broadcast station without first obtaining a license from the Commission. 47 U. S. C. § 301. Only qualified persons may obtain licenses and they must operate in the public interest. 47 U. S. C. §§ 308-309. But nowhere in the Act is there the slightest suggestion that a person may be compelled to enter the broadcasting or cablecasting field. Rather, the Act extends "to all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States." 47 U. S. C. § 152 (a) (emphasis added). When the Commission jurisdiction is so limited, it strains logic to hold that this jurisdiction may be expanded by requiring someone to "originate" or "receive."

The Act, when dealing with broadcasters, speaks of "applicants," "applications for licenses," see 47 U. S. C. §§ 307-308, and "whether the public interest, convenience, and necessity will be served by the granting of such application." 47 U. S. C. § 309 (a). The emphasis on the Committee Reports was on "original applications" and "application for the renewal of a license." H. R. Rep. No. 1918, 73d Cong., 2d Sess., 48; S. Rep. No. 781, 73d Cong., 2d Sess., 7, 9. The idea that a carrier

or any other person can be drafted against his will to become a broadcaster is completely foreign to the history of the Act, as I read it.

CATV is simply a carrier having no more control over the message content than does a telephone company. A carrier may, of course, seek a broadcaster's license; but there is not the slightest suggestion in the Act or in its history that a carrier can be bludgeoned into becoming a broadcaster while all other broadcasters live under more lenient rules. There is not the slightest clue in the Act that CATV carriers can be compulsorily converted into broadcasters.

The plurality opinion performs the legerdemain by saying that the requirement of CATV origination is "reasonably ancillary" to the Commission's power to regulate television broadcasting.² That requires a brand-new amendment to the broadcasting provisions of the Act, which only the Congress can effect. The Commission is not given *carte blanche* to initiate broadcasting stations; it cannot force people into the business. It cannot say to one who applies for a broadcast outlet in city A that the need is greater in city B and he will be licensed there. The fact that the Commission has authority to regulate origination of programs if CATV decides to enter the field does not mean that it can compel CATV to originate programs. The fact that the Act directs the Commission to encourage the larger and more effective use of radio in the public interest, 47

² The separate opinion of THE CHIEF JUSTICE reaches the same result by saying "CATV" is dependent totally on broadcast signals and is a significant link in the system as a whole and therefore must be seen as within the jurisdiction of the Act." *Ante*, at 675. The difficulty is that this analysis knows no limits short of complete domination of the field of communications by the Commission. This reasoning—divorced as it is from any specific statutory basis—could as well apply to the manufacturers of radio and television broadcasting and receiving equipment.

U. S. C. § 303 (g), relates to the objectives of the Act and does not grant power to compel people to become broadcasters any more than it grants the power to compel broadcasters to become CATV operators.

The upshot of today's decision is to make the Commission's authority over activities "ancillary" to its responsibilities greater than its authority over any broadcast licensee. Of course, the Commission can regulate a CATV that transmits broadcast signals. But to entrust the Commission with the power to force some, a few, or all CATV operators into the broadcast business is to give it a forbidding authority. Congress may decide to do so. But the step is a legislative measure so extreme that we should not find it interstitially authorized in the vague language of the Act.

I would affirm the Court of Appeals.